THE

LAW QUARTERLY REVIEW.

No. LX. October, 1899.

NOTES.

The London Conference of the Comité Maritime International.

THE Comité Maritime International held its Conference this year in London on July 13, 14, and 15. The object of the Comité is the unification of maritime law, and the subject now under discussion is the law relating to collisions at sea. Last year, at Antwerp, certain resolutions were passed touching the incidence of loss where one or both ships are in fault; where a ship is in tow, or in charge of a 'compulsory' pilot; and other matters of detail arising in collision actions. This year the subjects discussed were (1) whether, when both ships are in fault, the proportionate division of damages should apply to claims by cargo-owners and other third parties having claims arising out of the collision; and (2) whether shipowners' liability should be limited, and, if so, in what way. As to the former question a resolution was passed to the effect that the proportionate division (which had been adopted last year, at Antwerp, as between the ships) should apply to claims by cargo-owners. Whether the same or what rule should apply to claims in respect of loss of life and personal injury was expressly left undecided. The only point to be noticed upon this resolution is the unwillingness of the Conference to deal with the 'life' claims. The same unwillingness in connexion with the same class of claims appeared in discussing the next question.

The main interest of the meeting centered round the subject of the limitation of shipowners' liability. As to whether the liability should be limited or unlimited there was no discussion at all; it was assumed, apparently upon the ground that limitation is common to the laws of all countries, that limitation must remain. The difficulty was to arrive at an agreement as to the manner and extent of the limitation. It is the law of England that creates the

difficulty. By the laws of all other countries the liability of a shipowner is limited, in effect, to the value of his ship on her arrival at the port of arrest after collision; so that in no case can the injured party recover more than her value at the time of collision; and, if she is damaged or lost in or after the collision, his remedy is either diminished or altogether disappears. It was stated at the Conference by at least one of the English speakers that this was formerly the law of England, and that the divergence of English from Continental and American law was created by a recent (1854) Act of Parliament. This is not so. The liability of the shipowner in England has always been personal, and, like any other personal liability, remains and always has remained unaffected by anything that might happen to his ship in or after the collision. Herein lies the fundamental difference between the law of England and the laws of the rest of the world. Although the laws of foreign countries differ amongst themselves in matters of detail, and even upon the fundamental question whether the primary liability attaches to the shipowner or to the ship, they all agree in this, that if his ship is lost, or if he abandons her to the claimant, the shipowner is free from liability. A further difference exists between the law of England and that of other countries in the manner in which the liability is measured. Elsewhere the measure of liability is the value of the wrong-doing ship; in England, since the passing of the Merchant Shipping Act, 1854, it has been a sum calculated with reference to her tonnage; the sum varying according as the collision is accompanied by loss of life and personal injury or not. This peculiarity of English law is of far less importance than the other. It does not depend upon or involve any principle, and is merely a rule of convenience, which might be altered or abolished, if by so doing uniformity of law in more important matters could thereby be attained.

From the above statement it will be seen that the shipowner who suffers most from the existing difference between English and foreign law is the English shipowner. In case of a collision between his ship and that of a foreigner, if the English ship is in fault for the collision, and sinks, or is damaged, the owner of the foreign ship comes to England and there recovers against the English owner full damages up to the statutory limit of his liability; on the other hand, if the foreign ship is in fault and is herself lost in or after the collision, the English shipowner suing in the foreign Court can recover nothing. To remedy this injustice the London Conference recommended the following rule for adoption by all countries:—

'That the shipowner should be enabled at his option to discharge

his liability either (1) by abandoning his ship and freight, or (2) by paying damages not exceeding a sum to be calculated with reference to the tonnage of his ship.'

But here again claims for loss of life and personal injury are expressly excluded from the operation of the proposed rule.

The result arrived at by the Conference has been called a compromise; but it is in fact no compromise at all, but a surrender by England of the principle of personal liability. It enables English shipowners to avoid personal liability for the acts of their servants in those cases where it is to their interest to do so, and it enables foreign shipowners to adopt the English principle of measuring liability by tonnage, where that rule is more advantageous to them than their existing rule of abandonment. The omission of life claims is significant. It was felt that it would be hopeless to ask the British Legislature to enact a law which in certain cases would deprive those killed or injured by negligence at sea of any redress. But it would be no less hopeless to ask for an alteration of the existing law for the sake of uniformity, when the proposed alteration would create further differences in the law applicable to different classes of claims. The question would certainly be asked, Why a law which is desirable for one class of claims is not desirable for another class? The answer can only be that the injustice of the proposed rule in the case of life claims is so flagrant that it cannot be applied to them, whereas the advantages to be gained by having a uniform law for cargo claims outweighs any possible or apparent injustice which may result from its application.

It was indeed denied by some of the foreign speakers at the Conference that their rule of escaping liability by loss or abandonment involved any injustice at all; the real injustice, they said, is in holding one man liable for the wrong-doing of another, and some of the English speakers, who assumed the superior justice of the English principle, were soundly rebuked for obstinately adhering to a rule which was repudiated by the rest of the world, and which was the main obstacle to uniformity. The fact is that the discussion revealed a surprising divergence of ideas as to elementary principles of justice. The principle at the bottom of the English law relating to collisions is *respondeat superior*; the principle at the bottom of foreign law is *noxae deditio*. Which of these principles is the more rational—the more in accordance with modern ideas of justice? Until all nations are agreed in answering this question in the same way, uniformity of law in the matter of shipowners' liability for collision is a very long way off.

A resolution was, nevertheless, passed by the Conference directing

the Comité to point out to the British and other Governments the inconveniences arising from the present diversity of laws, and inviting the British Government, in particular, to institute an inquiry into the whole subject of liability for collisions at sea.

Williams v. *Birmingham Battery Co.* ('99, 2 Q. B. 338, 68 L. J. Q. B. 918, C. A.) follows the principle of *Smith* v. *Baker* ('91, A. C. 325), and decides that where a tramway company had negligently failed to keep the tramway in a safe and proper condition, and owing to this state of things, a servant of the company met with an accident and was killed, the defendants were liable to make compensation to his widow under the Fatal Accidents Act, 1846, and that their liability was not lessened by the fact of the deceased knowing that the tramway was dangerous. The case is in fact an illustration of an important change in judicial opinion. Some thirty or forty years ago the tendency of our Courts was to hold that the persons who entered into an employment knowing its risk, or continued in it after knowing of a particular risk, made a tacit contract whereby in return for their wages they undertook to run the risk, and therefore were precluded from asking for compensation for damage arising from the risk. 'It is a rule of good sense,' to quote the words of Lord Bramwell, 'that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate' (*Smith* v. *Baker*, '91, A. C. 325, 344). For this view there is more to be said than popular opinion is at the present day willing to admit; it represented the supremacy of *laissez faire* in the field both of political economy and of law. It has now ceased to exert influence. Among lawyers its last and ablest advocate was Lord Bramwell. Whoever will be at the pains to compare the tone of his judgment in *Smith* v. *Baker* with the tone of the judgment of the Court of Appeal in *Williams* v. *Birmingham Battery Co.*, will be able to form some idea of the change in public opinion which has taken place between 1840, when Lord Bramwell's economical and social opinions were formed, and 1899. The change is the more remarkable because the law courts must always represent the conservative opinion of each generation, and there is no reason to suppose that the judges of the Court of Appeal, such as A. L. Smith and Romer L.JJ., differ greatly in natural tone of mind from Lord Bramwell.

The tendency of recent decisions in the Court of Appeal is certainly towards a stricter view of the responsibility of persons and bodies undertaking works attended with possible danger to the

public, and against allowing them to escape on the ground that the person to whom the execution of such work was committed was an 'independent contractor,' or that his negligence was merely 'collateral.' Following on *Penny* v. *Wimbledon Urban Council* (noted p. 223 above) we now have *Holliday* v. *National Telephone Co.*, '99, 2 Q. B. 392, where the Court of Appeal reversed the decision of a Divisional Court and restored the original finding in the City of London Court, being evidently minded to treat the rule as a broad rule of public policy and discourage minute exceptions.

The Judicial Trustees Act is evidently destined to mark a new and much needed era in the history of trustees. When the common law had stiffened into too great rigidity equity arose to relieve against the hardships it inflicted. Anon the same fate overtook equity. It too stiffened into a system and lost its elasticity, and trustees have been the victims ever since. Victims may seem too strong a term, but it is not. For there are certain classes of cases so complex, so special in their circumstances, that they cannot be satisfactorily or equitably solved by any hard and fast rules, and to this category belong trusts. They can only be dealt with by a principle administered by a judicial discretion. This principle has now been provided by the Judicial Trustees Act, and is being most satisfactorily worked by the Courts. All it requires of a trustee is that he shall have acted honestly and reasonably, not that he shall never commit a technical breach of trust. *Perrins* v. *Bellamy* ('99, 1 Ch. 797, 68 L. J. Ch. 397, C. A.) furnishes an excellent illustration. The trustees there had sold leaseholds, acting under the advice of their solicitors that they had power to sell: and the sale was a proper one, but it turned out that they had technically no power to sell, and of course there was the unconscionable cestuique trust ready as usual to take advantage of the slip. But he had reckoned without the Judicial Trustees Act, and the Court had no difficulty in coming to the conclusion that this was a breach of trust which ought, in the words of the Act, 'fairly to be excused.' A few years ago the Court would have had no option in such a case but to order the pound of flesh to be carved off the unfortunate trustee.

When does an accident 'arise out of and in the course of employment' under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 1, sub-s. 1?

This is the question raised by *Holness* v. *Mackay & Davis* ('99, 2 Q. B. 319, C. A.). *H* a ganger on the way to his work, but before he has reached his working place, and before his working day has

begun, is, while properly crossing with due authority a line of railway, knocked down by a steam engine and killed. His widow claims compensation under the Workmen's Compensation Act, 1897, s. 1, sub-s. 1.

The Court of Appeal, A. L. Smith and Vaughan Williams L.JJ., hold that under the circumstances the accident did not arise out of and in the course of the ganger's employment, and therefore his widow is not entitled to compensation. From this judgment Romer L.J. dissents. He holds that the accident did arise out of and in the course of the deceased's employment, and therefore that the widow is entitled to compensation.

No competent critic will think this difference of opinion unnatural. The truth is that the case illustrates the extreme difficulty of fixing with precision the exact limits of a rule of law. The judgment of the majority of the Court gives a very definite sense to the term employment. It must mean, on the view taken by them, 'the work for the day,' and, be it noted, it is reasonable that the new and heavy responsibility cast upon employers should be kept within definite (which is a different thing from narrow) limits. The dissenting judgment of Romer L.J., on the other hand, gives a wide sense to the terms of the enactment which may be thought to answer to its spirit. But this wide interpretation greatly extends the liability of employers. It almost necessarily follows that an employer must be liable for any accident happening to a workman whilst going along the right way to and from his work. This if the plaintiff in *Holness* v. *Mackay & Davis* had lived five miles from the place where he laboured, and whilst walking to his working place, had long before the working day begun at any part of the road been knocked down by a motor car and killed, his widow would apparently have had, in the opinion of Romer J., a right to compensation.

The bonâ fide purchaser for value is and ought to be a favourite of the law, for it is a condition of all sound and healthy trade that a person who answers that description should get an indefeasible title; but the law has to be very strict in seeing that a person does answer that description before it allows his title to prevail in derogation of the rights of an innocent third person. It would have been anything but a credit to English principles if the defendant in *Oliver* v. *Hinton* ('99, 2 Ch. 264, 68 L. J. Ch. 583, C. A.) had made good his claim; for nothing could be plainer to any one conversant with the methods of English conveyancing than that this so-called bonâ fide purchaser had been guilty of gross negligence, altogether disentitling him to pose in that character. True he had asked for

the title-deeds, and been put off with a pretext that they related to other property—a good ground, as Rigby L.J. pointed out, for non-delivery but not for non-production. He should at once have said, 'Let me see them,' and had he done so the trouble would never have occurred. Lawyers and their charges are a never-failing theme of obloquy, but here we have an illustration of the danger of conducting a purchase through a lay agent instead of a solicitor. No solicitor would have made such a mistake.

The only difficulty was occasioned by the dictum of James L.J. in *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; but Homer nods, and even a Lord Justice James may at times express himself with something less than the accuracy of a code. 'Gross negligence' is the phrase used by the Court in *Oliver* v. *Hinton*, meaning by the 'vituperative epithet' not a suggestion of bad faith, but a total absence of ordinary precaution.

There was a time, and not so long ago either, when an imputation of unchastity against a woman was not actionable without proof of special damage. Our robust common law was not disposed to be too nice about a little license in the matter of language, though there are medieval examples of actions for mere verbal abuse in manorial courts. Hard words, it held, break no bones. Society has grown more sensitive now and more exacting as to the proprieties, and has put up the standard in the Slander of Women Act, 1891. Commercial credit is not so delicate a thing as female honour, but it is one highly susceptible of injury, for credit is in these days the very breath of a business man's life, and a person who presents a bankruptcy petition against a person deals a heavy blow at his commercial status. Yet as the law stands it is not clear that any action will lie without an averment of special damage. The presentation of a winding-up petition against a company without reasonable and probable cause is a ground of action without any proof of special damage, and if so, why not an unfounded bankruptcy petition? Of the two the bankruptcy petition is the worse, because it carries with it what a winding-up petition does not necessarily do, an imputation of insolvency. Moreover everybody, as Lindley L.J. points out in *Wyatt* v. *Palmer* ('99, 2 Q. B. 106, 68 L. J. Q. B. 709, C. A.), is now—for the purposes of bankruptcy—in the position of a trader. It is rather surprising that there should be so little authority on this point, but the explanation no doubt is that creditors for a very obvious reason prefer to levy execution rather than take bankruptcy proceedings unless the debtor is hopelessly insolvent.

A decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent cases. An erroneous decision can be set right only by an Act of Parliament (*London Street Tramways Co.* v. *London County Council*, '98, A. C. 375).

This doctrine of the finality or infallibility of judgments pronounced by the House of Lords is said to be essential to the maintenance in England of a fixed science of law, but like every other assumption, which, however convenient, does not exactly correspond with facts, it may cause curious results. Thus it imposes upon our judges the occasional duty of reconciling legal dogmas which are in reality irreconcilable. This was the task which had to be discharged by Darling and Channell JJ., when giving judgment in the *Equitable Life Assurance Society of the United States* v. *Bishop*, '99, 2 Q. B. 439. The immediate question before them was, to put it in its simplest form, whether the bonus returned by an insurance society to participating policy holders out of the earnings and receipts over the dividends, losses, &c. of the year was to be accounted 'annual profits or gains' within the Income Tax Acts, and was therefore assessable to income tax.

The question presents difficulties of its own, but the Court were referred for its decision to two judgments of the House of Lords, viz. *Last* v. *London Assurance Corporation* (1885), 10 App. Cas. 438, and the *New York Life Insurance Co.* v. *Styles* (1889), 14 App. Cas. 381. The unfortunate thing is that these two cases all but contradict one another. *Last* v. *London Assurance Corporation* seems to lay down that where a life insurance company on the mutual principle returns a bonus to policy holders the bonus is annual profits and gains, and as such assessable to income tax. The *New York Life Insurance Co.* v. *Styles* appears to lay down that where a life insurance company on the mutual principle returns a bonus to policy holders the bonus must not be held to be annual profits or gains and is not assessable to income tax. How are we to reconcile this contradiction? The difficulty is increased by the fact that Lord Bramwell dissented from the judgment of the House in *Last* v. *London Assurance Corporation*, but agreed with the judgment of the House in the *New York Life Insurance Co.* v. *Styles*, whilst the Lord Chancellor, together with Lord Fitzgerald (who was a party to the judgment in *Last's* case), dissented from the judgment of the House in the *New York Life Insurance Co.* v. *Styles*. The Queen's Bench Division did under these circumstances the best they could. They held in effect that the two cases are distinguishable, and that the *Equitable Life Assurance Society, &c.* v. *Bishop* is governed by the principle laid down in *Last* v. *London Assurance Corporation*, or in other words, that under the circum-

stances of the particular case, the surplus returned or the bonus paid consists of profits and gains, and is as such assessable to income tax. We do not know that the Court could have done better. Whether their judgment, should it come before the House of Lords, will be upheld, is a matter on which it were rash to pronounce an opinion.

In plain truth, though *Last* v. *London Assurance Corporation* is distinguishable from, it is not in reality consistent with, the *New York Life Insurance Co.* v. *Styles*.

If the words 'annual profits or gains' mean in the Income Tax Acts what they would mean in the mouth of a political economist, then Lord Bramwell was right, and *Last* v. *London Assurance Corporation* was wrongly decided.

If, on the other hand, the words 'annual profits or gains' in the Income Tax Acts do not by any means always mean exactly what they would mean in the mouth of an economist, as was maintained with force by Lord Blackburn in *Coltness Iron Co., Lim.* v. *Black* 6 App. Cas. 315, then the Lord Chancellor and Lord Fitzgerald were right, and the *New York Life Insurance Co.* v. *Styles* was wrongly decided.

It is, it may be added, quite possible that the House of Lords will, should the *Equitable Life Assurance Society, &c.* v. *Bishop* come before them on appeal, affirm the judgment of the Q. B. D. and revert in effect to the view which the House followed in *Last* v. *London Assurance Corporation*. The practical reason in favour of this course is that any attempt to follow out subtle reasonings which lead to the conclusion that an apparent yearly surplus does not in reality come within the words 'gains or profits' threatens to make liability to the income tax depend upon the way in which companies keep their accounts.

The *South African Breweries, Lim.* v. *King* ('99, 2 Ch. 173, 68 L. J. Ch. 530) is the latest of the line of judgments in which *Hamlyn & Co.* v. *Talisker Distillery* ('94, A. C. 202), and *Jacobs* v. *Crédit Lyonnais* (1884, 12 Q. B. D. 589, C. A.), are the leading authorities, and is, though somewhat complicated in its circumstances, merely an illustration or reaffirmation of the principle that in case of doubt as to the local law which governs a contract, or in the particular case whether a given contract is an English contract or a South African contract, preference should be given to the law of the place with which the transaction has most real connexion. This principle, elaborately expounded by Bowen L.J. in *Jacobs* v. *Crédit Lyonnais*

(1884, 12 Q. B. D. p. 601), is in one sense clearly sound. Its defect is that in the sense in which it is obviously true it is an empty truism which gives no guidance whatever, whilst in the sense in which it must be understood, if it is to give any guidance, its truth is open to considerable dispute.

The point is worth a moment's consideration. Take the principle in its literal sense and its truth is self-evident. If you want to determine whether a contract is an English contract or an African contract you must clearly make out whether it is England or Africa with which it has the most real connexion. But then when this is granted the essential question, on what principle are you to determine whether a contract has most real connexion with England or with Africa, is left unanswered. The maxim however may mean, as in the mouth of Lord Justice Bowen it certainly did mean, much more than a truism. It may involve the assertion that no rule can be laid down for determining what is the country with which a given contract has most real connexion, and that setting aside all attempts to find a principle a judge must in each instance use his own sense and tact and knowledge of mankind and of mercantile usage, and determine what is the country with which a contract is really connected. This statement is certainly not a truism. The question is, whether it is true? It is distinctly opposed to the doctrines of a writer as eminent as Savigny, and though less clearly, to the teaching of Story. For all this it may very well be the right rule of action. If every judge were a Bowen we should think it as good a rule as could be followed. We would rather trust to the sense and tact of such a judge than to any rules laid down by speculative writers on Private International Law. But then it is not every judge who is a Bowen, and the question suggests itself, is it impossible by careful analysis to lay down some principles for primâ facie at any rate determining what is the country with which a contract has most real connexion?

The South African Breweries, Lim. v. *King* presents one singularity. Each of the parties to the contract knew when they entered into it that it was possibly invalid. Ought not this in truth to be a reason, if it be invalid under the law either of England or of South Africa, why the Court should refuse to enforce it?

An Act of Parliament can, as Lord Bowen once said, declare that a horse shall mean a cow, or a salmon an oyster, regardless of all laws of natural history, and those who are conversant with the methods of the Parliamentary draftsman will not therefore experience very much surprise at hearing that a gift of a pearl

necklace to a lady is a 'settlement' within s. 47 of the Bankruptcy Act, 1883. Such words in Acts of Parliament are but algebraic symbols useful, nay necessary, in the exigencies of drafting to denote a complex subject-matter. No doubt settlements were uppermost in the draftsman's mind, because they were and are the commonest mode of defeating the policy of the Bankruptcy laws: but the interpretation clause, by making settlement cover a voluntary conveyance or transfer—a favourite mode of defrauding creditors before and since 13 Eliz. c. 5—shows that the sect. 47 net was to be spread very wide. Rather unfortunately judicial caution prevailed in *In re Player* (15 Q. B. D. 682, 54 L. J. Q. 554) and adopted the construction that 'conveyance or transfer' meant 'conveyance or transfer in the nature of a settlement': hence the difficulty in *In re Tankard* ('99, 2 Q. B. 57, 68 L. J. Q. B. 670). Is a gift of a pearl necklace to a lady with the intention that she shall keep it, but without any restraint on the *jus disponendi*, in the nature of a settlement? Wright J.'s answer is that it is—the necklace was to be kept for enjoyment by the donee for an indeterminate time. Lord Ellenborough thought that such a doctrine pushed to extreme would make a son liable to refund every portion of money given to him by his father for his maintenance: but this is a misconception. All that the trustee can claim is what remains unspent of the gift in the hands of the donee or a volunteer claiming under him, at the date of the bankruptcy, not what has been spent or alienated in the interval without notice of any act of bankruptcy.

The Attorney-General v. *London County Council* ('99, 2 Q. B. 226, 68 L.J. Q.B. 823) decides a curious point of income tax law. Nothing turns upon the person from whom the Crown claims duty being the County Council. The point of the case may be most shortly stated and best understood if, taking small and imaginary sums, we put the matter in a concrete form.

£500 is due to the Council as yearly interest on a loan which they have made to a local authority. The debtor, as he is entitled to do under Schedule D, deducts the amount of income tax due on the £500 and, subject to the deduction, pays the £500 to the Council. He pays the amount deducted to the Crown.

A second £500 is due to the Council as the yearly rent of lands belonging to the Council. The occupier of the land pays under Schedule A the amount of income or property tax due to the Crown and, as he is entitled to do under Schedule A, deducts the tax so paid and, subject to the deduction, pays the rent of £500 to the Council.

The Council thus receives £1000 minus the amount deducted for income tax. The Council, however, owe interest amounting to £1000 to the holders of Council Consolidated Stock, and after in their turn deducting the duty due under the Income Tax Acts, pay the interest due to the stockholders out of the monies received as aforesaid.

The Council claim to keep the whole of this deduction. Their claim is based on the broad ground that the whole of the fund out of which the interest to the stockholders is paid has, as to £500 under Schedule D, and as to the other £500 under Schedule A, already paid income tax. It has been decided. as far as the Q. B. D., consisting of Day J. and Lawrance J., can decide the matter, that the Council is entitled to retain the deduction, in so far as the interest is paid out of monies taxed under Schedule D, i. e. following out our illustration, in so far as it is paid out of the first £500, but are not entitled to retain the deduction in so far as the interest is paid out of monies taxed under Schedule A, i. e. in so far as it is paid out of the second £500.

The decision may possibly be right, but the sums at stake are large, and we may fairly conjecture that the judgment of the Q. B. D. will give rise to an appeal.

The judgment in *Attorney-General* v. *London County Council* is open to at least two criticisms.

1. It establishes a singular and an unreasonable anomaly. It is possible to maintain that the County Council ought in no case to be allowed to retain for themselves the deductions made in respect of income tax on interest payable by them, but it is very hard on any ground of reason to maintain that they may rightly retain such deduction for themselves when the fund out of which they pay it has, before it comes into their hands, already paid income tax by deduction under Schedule D, but that they have no right so to retain it when the fund out of which they pay it has, before it comes into their hands, already paid income tax or property tax by way of deduction under Schedule A.

2. The judgment of the Q. B. D. turns wholly upon the interpretation of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24, sub-s. 3, of which the material words are as follows: 'Upon payment of any interest of money or annuities charged with income tax under Schedule D and not payable or not wholly payable out of *profits or gains brought into charge to such tax*, the person by whom such interest or annuity should be paid shall deduct the amount of income tax in force at the time of such payment'; and, to put the matter shortly, shall pay the

amount so deducted to the Crown. Now the allegation on the part of the Council is that 'such tax' means income tax generally, and that 'income tax' includes any tax imposed by the annual Income Tax Act under any of its schedules. The Court meets this by construing the words 'such tax' as meaning 'income tax charged under Schedule D.' This construction is not on the face of the enactment obviously right, and conflicts both with ordinary usage and, as Sir Edward Clarke points out, with the general language of the Income Tax Acts.

Subscribers to a company's memorandum of association have hitherto had a bad time of it. If any one was to be made a contributory, it was the subscriber, and there was a certain dramatic justice about this, seeing he had by subscribing the charter of the company put himself forward as a quasi promoter. It was no use, for instance, his urging that he had never sent in an application for the shares, or that he had signed conditionally only, or that his name had never been entered on the register, or in fact trying any other of the familiar subterfuges of the ordinary shareholder: for immediately on subscribing he was invested with the full legal status of a shareholder. In the matter of shares agreed to be issued as fully paid up he was—before the recent Relief Act—at a disadvantage nothing short of perilous, for how was he to satisfy s. 25 by filing a contract 'at or before the issue' of the shares, when the shares were issued to him immediately on his subscribing? (*Dalton* v. *Dalton Timelock Co.*, 66 L. T. 704). It is something therefore for the harassed subscriber to find himself allowed the same rights as ordinary shareholders in the matter of calls, that is to be only liable to pay calls in the amounts and at the times provided by the articles (*Alexander* v. *Automatic Telephone Co.*, '99, 2 Ch. 302, 68 L. J. Ch. 514). This qualification is one of no small practical moment to all shareholders, subscribers and non-subscribers alike. It is analogous to the principle of limited liability, that is it enables a person who is thinking of joining a company to calculate what he may fairly expect to have to pay and when. An indefinite liability to have the whole amount unpaid called at any moment would deter prudent people of small means from investing at all.

The most excellent machinery is of little use if left to rust, and this is what was in danger of happening to the winding up machinery, despite the drastic provisions of the 1890 Act. There were several ways known to the initiated of frustrating the policy of the Legislature. One was a debentureholders' liquidation. The debentureholders conniving with or acting at the instigation

of delinquent directors took up this position: 'our charge will exhaust the assets. The assets are therefore ours, and we have a right to administer them in our own way. We are not going to have them wasted in speculative proceedings for misfeasances or in actions for deceit against promoter-vendors'; and the Court had no option but to acquiesce in what was *ex debito justitiae*. Or the creditors were approached: 'A winding up by the Court with its attendant publicity,' it was urged, 'will ruin the company's business, which might otherwise be sold advantageously. You will get a much larger dividend if you support a voluntary winding up': and again the Court had to acquiesce when a majority of the creditors declared in favour of a voluntary winding up—unless indeed there were circumstances brought to its notice calling for investigation. It was to give check to these moves in the game that s. 14 of the Winding-up Act, 1890, was passed, empowering the official receiver to present a winding-up petition, and the Court to make an order thereon whenever satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories; and it is satisfactory to find that Wright J. is prepared to give a wide construction to the words of the section (*In re Jubilee Sites' Syndicate*, '99, 2 Ch. 204, 68 L. J. Ch. 427) for the purpose, for instance, of securing a public examination where a private one under s. 115 is found insufficient. Without favouring officialism in winding up, it is useful to have a power like this in reserve.

The Union Credit Bank v. *Mersey Docks, &c., Board* ('99, 2 Q. B. 205, 68 L. J. Q. B. 842) raises three cases with regard to conversion as neatly as if they were questions to be answered in an examination, and Mr. Justice Bigham gives replies thereto which are not only more authoritative, but we need hardly add, far more intelligent than can generally be obtained from examinees.

Case 1. Where *N* has obtained from *A* advances on the security of goods, namely hogsheads of tobacco, in the keeping of a wharfinger, *X*, and having repaid the advance on one hogshead only gets from *A* a delivery order in blank, so that *N* may obtain delivery of that one hogshead, and fraudulently fills it up so as to make it an order for the delivery not of one but of all the hogsheads, and thereupon having obtained them, sells them for his own advantage, has *A* a right of action against the wharfinger *X*?

Answer. *A* has no right of action since he constituted *N* his agent to fill up the blank order, and is estopped from saying that *N* filled it up wrongly. This doctrine is confirmed by *Young* v. *Grote*, 4 Bing. 353.

Case 2. Where under otherwise similar circumstances, *N* obtains a delivery order from *A* which is properly filled up by *A* for the delivery of one hogshead to *N*, and *N* thereupon by fraudulently altering the order, turns it into an order for the delivery of all the hogsheads which he thereby obtains from *X* and sells:—Has *A* a right of action against *X*?

Answer. *A* has a right of action. The reason is that in this case he never made *N* his agent to fill up the order. *N* by his fraud has induced *X* to give up goods which he had no right to deliver without *A*'s authority. *X* has, though morally innocent, been guilty of conversion.

Case 3. Where under circumstances otherwise similar to case 2, *N* has fraudulently obtained delivery of goods from *N* the wharfinger, and afterwards deposits them with *Y* for a further advance, and then, having repaid this further advance, resumes possession of the goods and sells them, *Y* having had throughout the whole transaction no knowledge of *N*'s fraud, has *A* a right of action against *Y*?

Answer. *A* has no right of action against *Y*. It will be observed that *Y* has throughout done nothing whatever wrongful. He has received goods from *N* which he had no reason to suppose were not *N*'s own, and then, on *N*'s demanding them back, has, believing them to be *N*'s own, returned them to him. *Y* is no more a wrongdoer than a carrier who, without knowing that goods are stolen, carries them for the thief from one town to another and then gives them up to him, is a receiver of stolen goods.

'I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a Taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed, having regard to the context in connexion with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be implied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said.'

This is the language of the Lord Chief Justice (*Attorney-General* v. *Carlton Bank*, '99, 2 Q. B. 158, 68 L. J. Q. B. 788). It is refreshing from its broad common-sense, and brushes aside a whole host of

technical and unreal arguments constantly produced either for or against the Crown, whenever the incidence of a tax is in dispute. The two maxims, 'There is no reason why a Taxing Act should be construed differently from any other Act,' and 'Courts have to give effect to what the Legislature has said,' are invaluable. We hope they will be noted by the writers of text-books, no less than by judges. If properly weighed these maxims will cancel many pages in treatises on the interpretation of statutes.

But one exception can be taken to the language used by Lord Russell of Killowen. The words, 'I know of no authority for saying that a Taxing Act is to be construed differently from any other Act,' go a little beyond the fact. Whoever chooses to look for it may find a good deal of authority, or in other words, many dicta let drop by eminent judges in favour of construing Revenue Acts in a peculiar manner; nor, it may be added, were these dicta in themselves absurd. They are now worthless because they refer to a state of things which has passed away. When a tax was a real gift from the tax-payer to the king, it was reasonable to construe narrowly the terms of the grant. Now that the Taxing Act is a law passed by the nation for the raising of money required for the national expenditure, there is no apparent reason why it should be construed differently from any other statute.

Huggins habitually cashed cheques at the London and County Bank. He had no other business relations with the bank; he kept no account there; he did not pay the bank anything for cashing his cheques. Was Huggins a 'customer' of the bank within the meaning of the Bills of Exchange Act, 1882, s. 82?

This is the main question raised by the *G. W. R. Co.* v. *London & County Banking Co.*, '99, 2 Q. B. 172, 68 L. J. Q. B. 875. It is answered by Bigham J. in the affirmative.

The most serious doubt may be entertained whether this answer is right. It is open to at least three objections.

First. It distinctly contradicts the interpretation put upon the word 'customer,' as used in the Bills of Exchange Act, 1882, s. 82, by Lord Justice Collins in *Lacave* v. *Crédit Lyonnais*, '97, 1 Q. B. 148, 154, 155.

'Sir Robert Reid contended that the section could not be taken to limit the protection to the case of the cheque being collected for a customer in the ordinary sense, that is a person who kept an account at the bank. He says, "the customer" must be used in a larger sense of the word, and, practically, as far as I could see,

must be taken to mean any one. I cannot see any dividing line between a person who has an account and any one who chooses to come with a cheque and ask the bank to collect it for him. . . . [Sir Robert Reid] . . . called the attention of the Court to a decision which undoubtedly decided that no one but a customer in the proper sense of the word, a person having an account at the bank, would be entitled to the benefit of the section. That is the case of *Matthews* v. *Brown & Co.*, 63 L. J. (Q. B.) 494. . . . I do not think it would have required the authority of that decision to convince me that the Act means what it says, and that protection is only given for obvious reasons to a bank which does collect for a customer in the real sense, if he is a person who has an account at the bank. At all events, if he is a person whose relations are much nearer and closer than those of Ponce in this case.' The present judgment of Bigham J. takes no notice of this judgment, but decides, in effect, that if a man habitually brings cheques to a bank to be cashed he does thereby become a customer.

Secondly. The interpretation put by Bigham J. on the word 'customer,' which is not defined by the Act, is inconsistent with ordinary language. 'Customer' is defined by Johnson as 'one who frequents any place of sale for the sake of purchasing,' and this definition as extended to a bank must mean at any rate one who frequents a bank for the sake of taking part in the transactions which form part of a banker's business.

Thirdly. The excessive protection given by Mr. Justice Bigham's interpretation to bankers is impolitic, as it deprives ordinary persons of the security which they ought to obtain from the fact that a cheque is not only crossed, but marked 'not negotiable.'

One thing at least is perfectly clear. It is impossible to get rid of the necessity of putting a definite interpretation on the word 'customer' by stating that whether a person is a customer of a bank within the meaning of s. 82, is a question of fact. The circumstances under which a person gets a cheque cashed are matters of fact, but the question whether these circumstances bring him within the terms of s. 82 is in the only sense in which law and fact can be opposed, a question of law or, in other words, a question as to the meaning to be placed upon the word 'customer.'

Desertion is one of those seemingly simple but really complex conceptions the meaning of which the law has to work out, and when it has done so it is only taunted with being subtle and sophistical. When people marry, what they pledge themselves to is to render to one another conjugal dues. A portion—and a large portion—of

these dues is conveniently summed up by the law in the comprehensive word cohabitation. It is quite consistent with the maintenance of this connubial cohabitation that the spouses may be physically separated, living apart by agreement or from the circumstances of their means or callings. This is not desertion, nor is an involuntary separation by imprisonment. Desertion presupposes an intention to determine cohabitation, to break off marital intercourse, and the real question therefore in cases of desertion is whether the facts evidence such an intention. *Koch* v. *Koch* ('99, P. 221, 68 L. J. P. 90) and *Pizzala* v. *Pizzala* (68 L. J. P. 91 *n*) furnish a good illustration. In both those cases the husband had formed a liaison and refused to break it off, and the wife left the house. Looking at such a case superficially, it might be said that the wife was deserting her husband, but the true interpretation of such conduct—the construction which the wife is entitled to put upon it—is that the husband intends she shall not live with him in the relations of what is called Christian marriage. He is in effect driving her away. *Huxtable* v. *Huxtable* (68 L. J. P. 83) is another example of how a separation voluntarily begun may become desertion by one of the spouses declaring an intention not to renew cohabitation.

By the premature death of the late Dr. Showell Rogers—whose contributions to this REVIEW are fresh in our readers' memory—we have lost one of the minority of lawyers who succeed in cultivating the graces of literature without prejudice to their professional learning. Modern specialism, unfortunately, tends to make that minority still smaller, and a loss of this kind, if possible, more regrettable.

The proceedings of the late court martial at Rennes offer no interest to students of legal science. But we are sure that we express the general feeling of the legal profession in this country when we respectfully tender our best sympathy and congratulations to Me. Demange and Me. Labori, who have worthily maintained the noble and ancient tradition of the French Bar in the face of enormous difficulties.

We collect from an answer given to a correspondent by the editors of the *Law Students' Journal*, who make it their special business to know such things, that they consider it possible, though not probable, that a hard-working student may qualify himself for the Bar Final Examination in three months' reading, starting

without any legal knowledge at all. It ought to be quite impossible. We do not believe that any corresponding feat is possible in any University in the British Empire.

The following information as to legal education in Upper Canada is communicated by Mr. N. W. Hoyles, Q.C., Principal of the Osgoode Hall Law School:—

The Province of Ontario occupies a unique position in regard to legal education. It has one Law School at Osgoode Hall, Toronto, which is the only avenue for admission to the practice of the law. This school was established on its present basis by the Law Society of Upper Canada in 1889 under the provisions of Rules passed by the Society in the exercise of its statutory powers. It is conducted under the immediate supervision of the Legal Education Committee of the Society, subject to the control of the Benchers of the Society in Convocation assembled. Its purpose is to secure, as far as possible, the possession of a thorough legal education by all those who enter upon the practice of the legal profession in the Province. To this end attendance at the school during three terms or sessions is made compulsory upon all who desire to be admitted to the practice of the law.

The course in the school is a three years' course, the term consisting of seven months, commencing in the latter part of September and ending in the latter part of the month of April following.

In each year two examinations have to be passed, one at Christmas, and the other in May following.

The staff of the school consists of the principal, whose whole time is given to the work, and four paid lecturers, members of the Bar in active practice (three of them being Queen's Counsel) who have, from an experience of many years in this work, become very familiar with their subjects and with the art of teaching.

Four independent examiners are appointed by the Law Society to conduct the examinations in the school.

The course of study in the school is as follows:—

First Year: Jurisprudence, Real Property, Equity, Common Law, Practice and Procedure.

Second Year: Criminal Law, Real Property, Personal Property, Contracts, Torts, Equity, Evidence, Constitutional History and Law, Practice and Procedure.

Third Year: Contracts, Real Property, Criminal Law, Equity, Torts, Evidence, Commercial Law, Private International Law, Construction and Operation of Statutes and Statute Law, Canadian Constitutional Law, and Practice and Procedure.

In all the years a number of Statutes relating to the various subjects of instruction have also to be mastered.

In addition to lectures by the staff, special lectures are delivered to the third year students by Judges of the Superior Courts and prominent members of the Bar, and Moot Courts, at which attendance is compulsory, are held in the second and third years.

'PENANG LAWYER.'

To the Editor of the LAW QUARTERLY REVIEW.

PENANG, August 23, 1899.

SIR,—In the July number of the LAW QUARTERLY REVIEW, the note on Mr. Napier's pamphlet on the law of the Straits Settlements concludes with a reference to the term 'Penang Lawyer.'

It may perhaps interest some of your readers to know why the term is applied to a stick.

Pinang is the Malay name for the areca palm, and the native name of the island is *Pulo Pinang*, or Areca Palm Island.

The mat sails formerly used in native boats were made from the leaves of one of the varieties of this palm, which is hence called *pinang layer* (pronounced 'liar'), the latter word meaning 'sail.'

The young palm cut as soon as a bole is formed makes a stick with a very heavy knob, which is a favourite weapon with local roughs.

A stranger purchasing such a stick and hearing it called *pinang layer* would take the name for *Penang Lawyer*, more especially as 'liar' is a very common native pronunciation of 'lawyer.'

I have the honour to be, Sir,

Your obedient Servant,

H. H. HUDSON,

Assistant Registrar, Supreme Court.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

ADMIRALTY DROITS AND SALVAGE—GAS FLOAT WHITTON, NO. II.

'IF treasure be found in the sea, the finder shall have it to this day'—wrote Coke in the seventeenth century[1]; and to the same effect Britton[2] and Bracton[3] three centuries and a half before.

'The right of flotsam, jetsam, and lagan, and other sea estrays, if they are taken up on the wide ocean, they belong to the taker of them, if the owner cannot be known. But if they be taken up within the narrow seas they do belong to the king; or in any haven, port, or creek, or arm of the sea, they do prima facie and of common right belong to the king, in case where the ship perisheth or owner cannot be known. . . . Although the right of these adventures of the sea within the king's seas belongs to him, yet the king hath little advantage of it, for by the custom of the English seas, the one moiety of what is so gained belongs to him that saves it.' Thus Hale towards the end of the seventeenth century[4].

'Goods found derelict and articles under the denomination of goods jetsam, flotsam, and lagan are frequently picked up at sea and brought into the ports of this kingdom, which, if not claimed by any owner within the period limited by law, belong of right to His Majesty in His office of Admiralty'—says an Act of Parliament in 1836[5], and the statement is repeated in a later Act of 1845[6]. Both these Acts charge the goods with a reasonable compensation to the salvors, to the amount of one-third of the net value of the goods, in case the owners prove title to them.

'Her Majesty and Her Royal successors are entitled to all unclaimed wrecks found in any part of Her Majesty's dominions,' except where the franchise has been granted to others: says the Merchant Shipping Act, 1894[7].

No salvage is payable in respect of a buoy picked up adrift in the Humber, says the House of Lords in 1897, unanimously affirming a decision of the Court of Appeal[8]; the ground of this decision being that salvage is not payable in respect of anything that is not a ship or part of a ship or ship's cargo.

[1] Inst. i. 168.
[2] l. i. c. 18: 'tresor trové en la mer.'
[3] l. iii. c. 3: 'si quid in mari longius a littore inveniatur.'
[4] De Jure Maris, Hargr. Law Tracts, p. 41.
[5] 6 & 7 Will. IV, c. 60, s. 7.
[6] 8 & 9 Vict. c. 86, s. 54.
[7] 57 & 58 Vict. c. 60, s. 523. By s. 510 'wreck' includes flotsam, jetsam, and lagan.
[8] *Gas Float Whitton, No. 2*, '97, A. C. 373.

Each of the first four of these statements of the law touching the respective rights of the finder and the Crown in property rescued from the sea below low water mark, fairly represents the state of the law at the date at which it was made; but the decision of the House of Lords in *Gas Float Whitton, No.* 2 is not in accordance with the practice of the Admiralty which has prevailed for at least three centuries. The right of the finders of sea casualties 'in Her Majesty's dominions' has declined from the absolute right of the thirteenth century to nothing at all—not even payment for work and labour—in the nineteenth. What their right may be in the case of sea casualties picked up outside Her Majesty's dominions is not so clear.

Let us see how the Courts have dealt with the matter, and by whom such goods have in past ages been enjoyed. Flotsam, jetsam, and lagan—*adventurae maris*—says Lord Hale in the treatise already quoted, as distinguished from wreck taken up on the seashore, belong peculiarly to the Admiral jurisdiction; and it is from the records of the Admiralty Court that most of our information is to be gleaned. The Admiral's Court, so far as the present writer has been able to trace it, had no existence before the middle of the fourteenth century; and the continuous series of records does not begin until nearly two centuries later. There is, however, some evidence of sea estrays having been dealt with by the common law in the thirteenth, fourteenth, and fifteenth centuries.

The charter granted in 1278 to the Cinque Ports by Edward I indicates that at that date the practice was to divide sea estrays—'findalls' is the name by which they were known down to the last century—between the finder and the Crown. The charter[1] grants to the portsmen that they should have 'all their findalls (*inventiones*) on land and on sea . . . without making any partition thereof, and without rendering any part thereof to us or to our heirs or to any one else.' We shall see that during the fifteenth and sixteenth centuries findalls were divided, not between the finder and the portsmen, but between the finder and the Warden or Admiral of the Ports. When and how the Warden first became entitled to a share of findalls is lost in obscurity. The Warden was appointed by the Crown, and it would seem that the Crown could not grant to him perquisites which had been previously granted to the portsmen. Nevertheless in a patent of Lord Say de Sele, who was Warden of the Ports in the reign of Henry VI, there is a grant of 'commoditates, shares, wreccum maris.' This is clearly a grant to the Admiral of shares of sea casualties. The Admiral's 'shyre' or part is constantly mentioned in documents of

[1] Jeakes' Charters of the Cinque Ports, p. 67.

the period. In the sixteenth century the validity of such a Crown grant was contested by the portsmen, and two Wardens, Sir Edward Guldford in 1526[1] and Lord Cobham in 1561[2], had it confirmed by a grant from the Cinque Ports.

The close connexion which from the earliest times existed between the Admiralty of the Cinque Ports and the High Court makes it probable that the law administered by the two Courts was the same. The first Admiral mentioned in English records was Warden of the Ports; and in all probability the first Admiralty Court was that of the Warden. The 'curia principalis Admirallitatis Angliae' is not mentioned until the beginning of the fifteenth century, and seemingly did not exist before that date. The foundations of what afterwards came to be the Admiralty law of England were, in all probability, laid in the Cinque Ports Court. If, in the fourteenth and fifteenth centuries we find, as we do find, that by the law of the Cinque Ports Admiralty 'findalls' belonged to the Admiral and the finder, it would be unlikely that the law of England, as administered in the High Court, was different. In fact we find, as soon as the records of the High Court throw any light upon the point, that it was almost precisely the same. What makes the evidence as to the law of the Cinque Ports important upon the point under discussion is, that the waters within the jurisdiction of the Ports, particularly the Goodwins and the Downs, have always been the most prolific in sea-wreck and findalls.

From 1278 to 1310 no mention of the law of 'findalls' has been found. In the latter year some casks of wine, part of the cargo of a wrecked ship, were picked up floating on the high sea. The king claimed on the ground that the wines were 'adventurae maris de quibus nullus potest aliquid clamare nisi salvatores et dominus rex.' The claimant was a landowner on whose fee the goods were landed. It was decided that he was entitled to nothing; two-thirds were awarded to the finders and one-third to the king. 'This,' says Hale, 'though it were a proceeding in Gersey[3], who were heretofore and yet are guided by the customs of Normandy, yet even these customs as to the point of wreck are very near if not altogether the same with those of England.' The property of the owner of *adventurae maris* was, he says, by the seizure of the king's officer, wholly divested; the law differing in such case from that applicable to seashore wreck, which, if claimed within a year and day, was by virtue of 3 Edw. I, c. 4, restored to the owner.

A case in which the law of findalls was discussed occurred in

[1] S. P. Dom. Hen. VIII, vol. iv, No. 2250 (4).
[2] S. P. Dom. Eliz. vol. xvi, No. 57.
[3] Hale, *De Jure Maris*, Hargr. Law Tr. p. 39. The case is cited from Placita Gersey.

1333. Some men of Dover had picked up at sea a cargo of herrings, which had been jettisoned from a French ship. Half the fish were restored, and the salvors kept the other half. The owners protested, and the French king seized some English ships in France by way of reprisal. Letters passed between Edward III and Philip upon the subject, and the latter was told that his subjects had no right to be dissatisfied, since it was the custom of the sea for salvors to keep half goods salved, and that the lasts (lastas) of herrings 'prout moris est in casu hujusmodi pro medietate dividendas[1].'

The next evidence as to the law of findalls occurs in some records of the Cinque Ports Admiralty. There are at the Public Record Office a considerable number, about one hundred, of the original inquisitions taken at Sessions of the Cinque Ports Admiralty during the fourteenth and three following centuries. They deal mainly with the droits of the Warden; and the evidence they supply is overwhelming and conclusive that everything of value rescued from the sea was a droit, and that of all droits the Warden received a share, usually one-half, but sometimes, as in the case of anchors and ordnance recovered from the bottom, one-third. The salvor invariably takes the rest[2]. It will be enough to give a few examples. The earliest inquisition is of the year 1389; by it some men are presented for not accounting for the Admiral's shares of two boats found floating upon the sea[3]. In an account for the years 1401–3 rendered to the Warden by his droit-gatherer occurs the following[4]: 'Item receptum de iij^{s} xj^{d} receptis de Simone de Chapman et Willelmo Hardey et sociis suis pro j shire unius sayleyerd ij uptyes ij halsers per ipsos inventis in mari unde indictati existunt ... j shar j mensae per ipsos inventae in mari.' In 1535 a butt of wine was presented 'unde recepta pars per Grenway pro parte domini Admiralli.' In 1521, 'septem rethea vocata fflewnettes deliberata Willelmo Treulove pro parte domini Admiralli videlicet mediam partem'; and in 1535 a similar presentment of nets, of which half were delivered to the droit-gatherer 'pro parte domini Admiralli.'

Owing to the non-existence of any records of the High Court of Admiralty for the fifteenth century, it is not possible to say with certainty what was being done, outside the Cinque Ports, with sea estrays. The earliest patent of a Lord High Admiral in which the writer has found any mention of his perquisites is that

[1] Cl. 7 Ed. III, pt. 1, m. 24 d.
[2] These inquisitions are to be found generally in Exchequer Accounts, Q. R., and State Papers Domestic. References to some of them are given in Seld. Soc., Adm. Ct., vol. ii, xxxiii. seq.
[3] Acc. Exch. Q. R., bundle 67, No. 18.
[4] Acc. Exch. Q. R., bundle 43, No. 10.

of the Duke of Bedford, who was appointed Admiral in 1469. This document mentions certain 'proficua et commoditates' appertaining to the office. In view of the fact that at this time we know that the Admiral of the Ports was enjoying his share of wreck and findalls, it may be inferred that the rights of the Admiral of England in such matters were similar. The patents of the Tudor Admirals are very full and precise as to their right of wreck, sea estrays, royal fish, and other profits arising from the sea; and soon after the High Court records begin we find that its practice was for the finder of goods at sea to present them on oath, with their appraised value, and either to bring in half the goods, or to pay half their value into court. This practice continued until the present century.

In the case of the Cinque Ports the recovery of the Admiral's 'share' was comparatively easy. His droit-gatherers were on the spot, and a rich findall could hardly escape notice. It was otherwise in the distant and thinly populated districts of the north and west of England. Of many a valuable findall on the coasts of Cornwall, Norfolk, Northumberland, and Wales nothing was heard by the Admiral or his officers in London. The office of Vice-Admiral of the coast was instituted to secure the Admiral's droits in the provinces, and to stop embezzlement. In the fourteenth and fifteenth centuries these duties were probably performed by the Admirals of the north, south, or west, who are frequently mentioned in documents of the period. The Vice-Admirals had other duties connected with the Navy and the Admiralty, but the collection of wreck and droits seems to have been their main occupation. They were local magnates resident in the sea-board counties, and they had the same powers and jurisdiction in the matter of wreck and droits as the Warden in the Cinque Ports, and the Lord High Admiral in London. Originally they alone had the right to take possession of wreck, the working salvors being either employed by them or deemed to be in their employment. All wreck and droits had to be delivered or presented to them. The office existed with the same jurisdiction and duties until 1846, when it was enacted by 9 & 10 Vict. c. 99, s. 12 that 'no Vice-Admiral or deputy Vice-Admiral of any county . . . shall, as such, henceforth receive, take, seize, or in any manner interfere with any wreck of the sea, or any' . . . goods found, jetsam, flotsam, lagan, or derelict. The office of Vice-Admiral still exists, but its jurisdiction over wreck and droits has not been revived.

The first Admiral who appears to have troubled himself much about his droits was Lord Howard of Effingham. The hero of the Armada was very keen about them. His views as to his rights

in such matters were extensive. The growth of the royal prerogative during the Tudor period, and the very wide terms of the Admirals' patents of those days, encouraged Howard not only to claim a share of prizes, pirate goods, wreck, sea casualties, deodands, and royal fish, all of which were expressly granted to him by his patent, but to set up claims to fisheries, rents for weirs, tide-mills, and other buildings on the seashore, and even to the seashore itself. Many of these claims were wholly unfounded in law, and as to sea casualties, their nature is such that, for the most part, they eluded the Lord Admiral's grasp. Howard ceased to be Admiral in 1618, and was succeeded by the Marquis, afterwards Duke, of Buckingham. With him and with his royal master money was a great difficulty, and Admiralty droits, particularly those of the Cinque Ports, were beginning to be productive. Shortly after his appointment Buckingham set up a claim to wrecks on the Goodwins and in the Downs. These undoubtedly belonged to the Warden, and Buckingham had to abandon his claim. But in 1624 he made a bargain with Lord Zouch, who was then Warden, and bought him out. He paid him £1,000 down, and promised £500 a year for the rest of Zouch's life[1]. This seems a large price for Cinque Port droits, but it was not extravagant, if, as we are told was the case, one gale yielded in anchors £200[2], and at one sitting of the Court £30,000 was made in droits[3]. The latter sum was, perhaps, the proceeds of some rich 'argosy' lost on the Goodwins, perhaps enemies' goods.

Upon Buckingham's death the right of the Crown to Admiralty droits reverted to Charles I. He did not part with them. 'The Admiralty, which shall be governed by commissioners,' writes Lord Goring in 1628, 'and the revenue thereof so added to the Crown, as I believe it will be hardly severed again. For £30,000 or £40,000 per annum is more than a song to part with[4].' Another writer of the period estimates wreck alone as worth to the Crown £1,000 a year. There is constant mention in the State Papers and Admiralty records of this period of wreck and droits. Particular attention was paid to the Vice-Admiralties; and in 1633 instructions were sent round to the Vice-Admirals, directing them to render yearly accounts, detailing particulars of all wreck and sea casualties coming to their hands. For their pains in the matter they were allowed one-quarter of the net proceeds of the goods; the salvor taking one-half, and the Crown the remaining one-quarter. Some of the accounts rendered by the Vice-Admirals are extant. The amounts received by the Crown were generally

[1] S. P. Dom. Jac. I, vol. clxx, No. 16.
[2] S. P. Dom. Jac. I, vol. clxxiii, No. 56.
[3] S. P. Dom. Car. I, vol. xix, No. 17.
[4] S. P. Dom. Car. I, vol. dxxix, No. 17.

insignificant, sometimes only a few shillings. The account, however, of Sir James Bagg, Vice-Admiral of Cornwall for 1628–34, charges him with £29,253, including a sum of £3,309 for ambergris. This amount is quite exceptional. There were frequent complaints that the Vice-Admirals did not send in their accounts, and that they connived at wrecking and embezzlements. The droit book for the High Court for the period 1618–1737 is extant[1], containing particulars of and dealings with all sorts of droits. It shows that every sort of property was claimed and presented as a droit. Ships, ships' gear, and cargoes are the most frequent objects; but dead bodies with valuables and money on them, fishing-nets, trawls, ambergris, spermaceti, royal fish, and treasure in wrecks or buried in the sand are not uncommon. There is no trace of any such distinction as that suggested by Hale between articles picked up in the seas of England and in foreign seas. The Crown claimed its share of all findalls, wherever found. Ships derelict in the Atlantic and in the Mediterranean, anchors picked up at Teneriffe, Malaga, and the Canaries, treasure at St. Lucar, spars and hoops in the Mediterranean, goods at Algiers and on the Italian coast, a boat off Greenland, wreck in Campeachy Bay, as well as ships, anchors, and cargoes from the Goodwins and the Downs, were all treated alike as Admiralty droits. In connexion with *Whitton, No.* 2, it is interesting to note that in 1635 there was presented 'magnum navale specularium, Anglice, a great buoy or sea marke,' picked up on the coast of Norway; and that in 1655 a great buoy, with twenty fathoms of chain, was taken up off the coast of Holland. The practice seems to have been uniform for the salvor, on duly presenting the droit, to receive half the proceeds. Sometimes he paid into Court half the appraised value; sometimes he kept half of the nets, casks, or other goods, where they were divisible, and delivered the other half to the officer of the Crown. If there was any concealment, and the presentment was made by the marshal or other officer of the Court, the informer got the salvage, and proceedings were taken against the finder for contempt in not presenting the goods. These proceedings, resulting in fine or imprisonment, are exactly reproduced by the indictments of the Cinque Ports Admiralty two centuries before.

On the whole, however, the revenue derived from the smaller droits, which are chronicled in the High Court droit book and the accounts of the Vice-Admirals, was ludicrously small. The trouble and expense of collecting it seems to have been considerable, and, in the case of the Vice-Admiralties, more than it was worth.

[1] Adm. Ct. Rec. Miscell. Books, 845.

Towards the end of the seventeenth century, a practice arose of requiring the Vice-Admirals to make an affidavit that their yearly profits did not amount to £50. In such cases probably they were excused from rendering an account. In 1709 some twenty Vice-Admirals took the required oath.

The only Lord High Admiral who, since the death of Buckingham, has beneficially enjoyed his droits, is the Duke of York, afterwards James II. Upon his accession to the throne they were added to the Crown revenues, and they formed part of the personal income of the Crown until 1831. The patent of Prince George of Denmark, who was Lord High Admiral to Queen Anne, contains a grant of droits, but there was a collateral arrangement by which it was provided that they were to be enjoyed by the Crown. The office of Receiver-General of droits seems to have been instituted about this time; but it was abolished in 1737, the expenses of the office in time of peace proving much in excess of the receipts[1]. At the beginning of the present century the office was again in existence, having, probably, been revived during the French wars, during which period the sums to the credit of Crown and Admiralty droits were enormous. Between 1793 and 1810 they amounted to £7,344,677.

The following extract[2] from the Court records shows that in 1729 a buoy picked up adrift was prima facie an Admiralty droit. In that year a warrant issued against 'a large buoy taken up in the channell between Ostend and Newport by James Alexander, master of the *James*, and brought into Plymouth.' Proceedings were taken in the usual course for its condemnation as a droit, but were discontinued upon the owners appearing and proving their title. There is no express statement that salvage was paid, but there can be little doubt that, according to the practice of the Court, it did not part with possession of the buoy until the Court fees, and also the salvor's share of the findall, were paid.

Towards the end of the seventeenth century a fashion arose for adventurers to get from the Crown grants of the right to fish for wrecks all over the world. For many years previously divers had been employed by the Admirals to recover anchors, ordnance, and other sunken property from the sea bottom. In the seventeenth century two divers, named Willis and Johnson, and in the previous century other divers, had worked for the Admiral upon the terms of receiving a share, one-third or two-thirds, of the goods recovered. The eighteenth-century grants of the right to fish for wreck were not confined to goods on or near the shores of England. Tin sunk

[1] Audit Off. Accts., bundle 1829, Nos. 535, 537. [2] Instance Papers, 38.

off Ostend, treasure and ordnance in the West Indian and Bermuda seas, as well as wreck and anchors on the Goodwins and in the Downs, were dealt with as Admiralty droits. Not much regard seems to have been paid to the claims of the owners of such property. A Vice-Admiral of Suffolk, in 1700, granted the right to fish for iron in a sunken wreck on the Whiting sand, about two miles off the coast of Suffolk, upon the terms that the grantee should have half the iron and pay one-third of the value to the king, the balance being probably appropriated to Court fees. The owner protested, and the High Court decreed that the owner should have the whole of the iron upon his paying into Court half its value (*semble*, for the salvors), and £200 for Court expenses. In the previous century (1635) the king's proctor had claimed, as against the owner, the whole of a ship found floating on the sea with no one in her. The treasure ships in Vigo were fished for in 1702, and the grantees got half the goods recovered, 'according,' says Dr. Bramston who advised the Crown, 'to the constant practice of the Court of Admiralty and ancient usage of the same[1].'

The student of the Admiralty records is surprised at finding in the eighteenth and early part of the present century that most of the smaller droits that came before the Court consisted of barrels of wine and spirits. These were usually smugglers' goods anchored to the bottom and buoyed for the purpose of being 'run' at a convenient season. High duties and an inefficient preventive service had thus provided the Admiralty with a new and valuable form of droit. Their owners, of course, never claimed their contraband goods, and the Court fees and costs of condemning them were a welcome addition to the waning profits of Admiralty practitioners. The Crown got little benefit from them, for the proceeds were usually swallowed up by the costs of seizure and condemnation. 'Salvage' was paid to the finders of such goods, which were treated as ordinary sea casualties; and there is no suggestion in the form of the proceedings that the salvors were rewarded as informers, or that the goods were condemned as contraband. The unnecessary expense attending condemnation of these droits attracted the attention of Parliament; and in 1836 an Act[2] was passed, whereby, after reciting that unclaimed derelict goods, jetsam, flotsam, and lagan, picked up at sea belonged to the Crown, but by reason of the smallness of their value and the cost of prosecuting them to condemnation were often wholly unproductive, it was enacted that such goods should be at the disposal of the Receiver-General of the droits of the Admiralty, who was to retain them for a year, at the

[1] Add. MSS. 5752, fo. 186.

[2] 6 & 7 Will. IV, 60, s. 7.

end of which, if no owner appeared, they were to be sold without formal condemnation, and the proceeds carried to the credit of the Consolidated Fund[1]. If the owner appeared and proved title, they were to be restored 'on payment of the duties and necessary charges attending the care of the same, and a reasonable compensation to the amount of one-third of the net value (after deducting the duties and charges aforesaid) to the salvors thereof.' This Act was repealed by 8 & 9 Vict. c. 53, but was re-enacted in the same terms, and, except as to the goods mentioned below, continued in force until its repeal in 1853[2]. As to small casks of spirits sunk or floating within one hundred leagues of Great Britain, it was by an Act[3] of the same year enacted that no one except Her Majesty's officers should take them up; but a reward was provided for those giving information thereof. These were Customs Acts, and were evidently intended to deal mainly with contraband goods, but the words of 6 & 7 Vict. c. 60, s. 7 are general and applicable to all kinds of droits; and whatever the effect of them may be as to droits other than casks of spirits, the Acts are interesting as showing that salvors' right to salvage of 'findalls' was recognized by the Legislature. The Act of 1831, however, which transfers 'the casual revenues of the Crown arising from droits' to the Consolidated Fund, is not so clear upon this point, for it reserves to the Crown the power to grant the droits or any part of them to 'any person seizing or taking or informing as to them' by way of 'reward[4].' These latter words are not quite apt to describe a salvor's maritime lien, but they were probably used mainly with reference to enemies' goods, as to which the non-commissioned captor or other taker is entitled only to a 'reward.' From sea casualties, if the view of the law here suggested is correct, no revenue could arise until the salvors' lien and costs of condemnation had been paid.

Vice-Admirals were receiving and rendering accounts of sea casualties down to the passing of the Salvage Act of 1846. Some buoys and objects which are not likely to have come from ships or their cargoes are mentioned in these accounts. The practice seems to have been to allow the finder one-third of unclaimed droits. In an account of the Duke of Northumberland, Vice-Admiral of Northumberland for 1825–1843, one-third was always allowed. A buoy picked up at sea was presented in 1838 by John Russell. In the account of the Vice-Admiral of Norfolk, in 1842, appears an

[1] To which droits had been transferred by 1 Will. IV, c. 25, s. 2; 1 & 2 Vict. c. 2.

[2] By 16 & 17 Vict. c. 107, s. 358.

[3] 8 & 9 Vict. c. 87, s. 78; 16 & 17 Vict. c. 107, s. 242.

[4] 1 Will. IV, c. 25, s. 12. In 1 & 2 Vict. c. 2, s. 12, the corresponding Act of the present reign, it is called 'a reward or remuneration.'

iron buoy marked with the broad arrow, presented by the master of the Hull steam packet. It was claimed by the Board of Admiralty; and it is noted that its value was agreed between the salvors and claimants. From the form of the account it is clear that this means 'agreed for the purpose of salvage,' and there can be little doubt that the salvors received one-third of its value. In the same account, under date Sept. 24, 1841, 'a beacon' is presented by a smack master. On Oct. 7, 1839, a 'land-roll' was presented, value *6s. 6d.* On Jan. 22, 1845, a buoy was presented and sold for £2 *8s.* This would seem to have been a sea-mark, and not an anchor-buoy; for anchor-buoys are frequently mentioned as droits, and usually sold for a few shillings.

Between 1712 and 1853 several Acts were passed dealing with droits and salvage, but none of them throw much light upon the question raised by *Whitton, No.* 2. Ships, ships' cargoes, and anchors are the matters principally dealt with. In 1809[1] an Act made it illegal for shipmasters and others to buy anchors and goods picked up at sea for sale abroad. The ancient practice of requiring the finders to present the goods to the Vice-Admiral, and of rewarding the salvor, or, in case of non-presentment, the informer, is continued by these Acts. In 1813[2] an Act requires lords of manors and others claiming wreck to report to the Vice-Admiral or to the Trinity House all derelict goods, the right of the salvor being expressly mentioned. Earlier Acts of 1712 and 1753 seem to deal only with wrecked ships and cargoes.

In 1846 an Act[3] was passed to consolidate and amend the whole law of wreck, droits, and salvage. It does not, however, repeal or refer to the Act of 1836. It makes a considerable change in the law as to droits and wreck by enacting, for the first time, that thenceforth Vice-Admirals shall not intermeddle with them; and it enables the Receiver-General of droits to deal with them in much the same way as is provided by the Act of 1836. It expressly recognizes the right of the finder of goods, jetsam, flotsam, lagan, or derelict, to salvage reward. The old law as to forfeiting the right to salvage by failure to report the goods is preserved. This Act was considered by the Master of the Rolls in *Gas Float Whitton, No.* 2, and he arrived at the conclusion, which was adopted by the other members of the Court of Appeal, and by the House of Lords, that it did not apply to things which were not ships or cargoes of ships. It is submitted that the history of the matter shows that this is not the true construction of the Act; that it was intended to apply to every thing that was or could be a droit of the Admiralty; and that the words 'every person . . . who shall act . . . in

[1] 49 Geo. III, c. 122. [2] 53 Geo. III, c. 87. [3] 9 & 10 Vict. c. 99.

the saving . . . of any goods, jetsam, flotsam, lagan, or derelict . . . shall be paid a reasonable reward . . . by way of salvage,' apply to such a case as the salvage of *Whitton, No.* 2 buoy. True it is that 9 & 10 Vict. c. 99 was not in force when *Whitton, No.* 2 was salved; and this Lord Esher is careful to point out; but this Act is an important factor in tracing the history and continuity of the law, and if prior to and after the passing of it salvage was by the common or by statutory law payable in respect of anything that is or may be an Admiralty droit, the right to salvage has not been taken away by any subsequent Act.

The words of 17 & 18 Vict. c. 104, s. 458, under which *Whitton, No.* 2 was decided (compare 57 & 58 Vict. c. 60, s. 546, the Act now in force), are almost the same: 'Whenever any wreck' (by s. 2 interpreted to include flotsam, jetsam, and derelict) 'is saved by any person . . . in the United Kingdom . . . there shall be payable by the owners . . . a reasonable amount of salvage. . . .' No difficulty is raised in *Whitton, No.* 2 by the words 'in the United Kingdom,' for the buoy was admittedly picked up in England—in the Humber. Those words may, indeed, on a future occasion give rise to a serious question; for if, as appears to be the case, the framers of the Act intended to say that things picked up and saved out of the United Kingdom are not Admiralty droits and are not the subject of salvage, they have not said so; and, in view of the continuous practice and decisions of the Admiralty Court for 300 years to the contrary, the silence of the Merchant Shipping Acts of 1854 and 1894 upon the point can hardly be deemed to have altered the law as to droits and salvage out of the United Kingdom. Lord Hale's distinction between goods picked up in the English seas and in the wide ocean has never been recognized in the Admiralty; and Coke's view as to the Crown having no right to sea 'treasure' (qy. casualties) is contradicted by the same authority.

On the whole the history of the law of droits and salvage seems to be this. Originally sea casualties belonged to the finder. Afterwards, as the power of the Crown increased, the Crown claimed and enjoyed them, when it could get them. So rarely, however, did it get them, by reason of embezzlement and concealment by the finder, that it was found advisable to concede one-half to the finder. This phase of the law is contemporary with the charter of Edward I to the Cinque Ports. Subsequently the rights of the original owner were recognized, and, as against him, and also as against the Crown, the finder was compelled to accept a reasonable reward for his pains. In the case of unclaimed goods the right of the finder to one-half continued to the last century, but was

reduced to one-third in or before 1836. The law of seashore wreck and the salvage thereof has developed upon very similar lines.

Something was said in the case of *Whitton, No.* 2, as to public policy and the limits which upon that ground should be placed upon the right to salvage. Public policy has been mentioned in previous judgments in salvage cases, but usually as a ground for dealing liberally with salvors. It has been said, with what truth the writer knows not, that one of the reasons why the owners of *Whitton, No.* 2 fought so stubbornly against the decisions of the county court and Admiralty judges, which awarded £15 salvage to the finders of the buoy, was an idea that upon grounds of public policy it was desirable that a declaration of the law should be obtained that salvage was not payable in respect of buoys. They feared, it is said, that unless such a declaration of the law were obtained, they might find other buoys adrift. It would be unfortunate if any such opinion affected the mind of the courts. There is another side to the argument to be drawn from public policy. The exceptional law which gives to those who save property from sea peril a right against the property has itself been evolved from an unjust law, which formerly gave such property wholly to the finder or to the Crown. The salvors' right is admittedly, even in these days, a right to something more than payment for work and labour. And although modern judges struggle to justify this law, the taint of original injustice still hangs about it. Nevertheless it is submitted that the time has not yet come for treating 'sea-coasters' wholly like people who on land volunteer their services to save property from danger. The history of wreck and salvage must be remembered. It is not pleasant reading. The line between legitimate salvage and inhuman wrecking has not always been carefully drawn, and unfortunate shipmasters and owners have in past ages suffered heavily from exactions by kings, admirals, judges, and Admiralty practitioners. But seafaring people are what the law and the circumstances of their calling have made them. The idea that property picked up at sea out of the possession of its owners belongs to the finders was formerly justified by the law; and the modern law of salvage which gives them an interest in a ship or cargo salved is founded in expediency rather than upon any principle of justice. Concealment and embezzlement of 'findalls' has been the besetting sin of salvors from the earliest days. A decision which denies to them the right to enforce by law their claim to be recompensed for their pains is to be regretted. The services of the men who brought *Whitton, No.* 2 into safety were slight, and the owners of the buoy may have been willing to give them a gratuity. But the expectation of a gratuity

does not satisfy seafaring salvors. In the early part of the seventeenth century, when the right of working salvors to enforce their claims by law was non-existent or doubtful, they gave vent to their feelings by declaring that 'they had rather trust God with their souls than the Admiral with their goods.' It is to be feared that this 'damnable tenet[1]' may again come into fashion, when they find that, before they can get any salvage in the Admiralty Court, they must prove that what they save from the sea is either a ship or part of a ship or ship's cargo.

The following case, some of the facts of which are in the writer's experience, and the rest have been verified to the best of his ability, is instructive. A certain smack's crew picked up in the North Sea a buoy adrift. With considerable labour they got it on board their smack, brought it thirty miles to land, and delivered it to its owners. From that day to this they have not received a farthing for their trouble. It is fair, however, to add that they were very remiss in pressing their claim.

R. G. MARSDEN.

[1] It is so described by a Vice-Admiral in 1636: S. P. Dom. Car. I. vol. ccexxii, No. 17.

THE NAMES AND NATURE OF THE LAW.

MY purpose in the following pages is to consider, in respect of their origin and relations, the various names and titles which have in different languages been borne by the law. This seems an inquiry fit to be undertaken in the hope that juridical terms may be found to throw some light upon the juridical ideas of which they are the manifestation. A comparison of diverse usages of speech may serve to correct misleading associations, or to suggest relations that may be easily overlooked by any one confining his attention to a single language. In undertaking such an examination, however, I speak as a lawyer merely, expressly disclaiming all right or title to speak with authority as a philologist. I shall be well content if, when so trespassing on alien soil, I meet with no pitfalls and keep with fair success to beaten tracks.

The first fact which an examination of juridical nomenclature reveals, is that all names for law are divisible into two classes, and that almost every language possesses one or more specimens of each. To the first class belong such terms as *jus*, *droit*, *recht*, *diritto*, *equity*. To the second belong *lex*, *loi*, *gesetz*, *legge*, *law*, and many others. It is a striking peculiarity of the English language that it does not possess any *generic* term falling within the first of these groups; for equity, in the technical juridical sense, means only a special department of civil law, not the whole of it, and therefore is not coextensive with *jus*, *droit*, and the other foreign terms with which it is classed. Since, therefore, we have in English no pair of contrasted terms adequate for the expression of the distinction between these two groups of names, we are constrained to have recourse to a foreign language, and we shall employ for this purpose the terms *jus* and *lex*, using each as typical of and representing all other terms which belong to the same group as itself.

What, then, are the points of difference between *jus* and *lex*; what is the importance and the significance of the distinction between the two classes of terms? In the first place *jus* has an ethical as well as a juridical application, while *lex* is purely juridical. *Jus* means not only law but also right. *Lex* means law and not also right. Thus our own *equity* has clearly the twofold meaning; it means either the rule of natural justice, or that special department of the civil law which was developed and administered in the Court of Chancery. The English *law*, on the other hand, has

a purely juridical application; justice in itself, and as such, has no claim to the name of *law*. So also with *droit* as opposed to *loi*, with *recht* as opposed to *gesetz*, with *diritto* as opposed to *legge*.

If we inquire after the cause of this duplication of terms, we find it in the twofold aspect of the complete juridical conception of law. Law arises from the union of justice and force, right and might. Law is justice recognized and established by authority. It is right realized through power. Since, therefore, it has two sides and aspects, it may be looked at from two different points of view, and we may expect to find, as we find in fact, that it acquires two different names. *Jus* is law looked at from the point of view of right and justice; *lex* is law looked at from the point of view of authority and force. *Jus* is the rule of right which becomes law by its authoritative establishment; *lex* is the authority by virtue of which the rule of right becomes law. Law is *jus* in respect of its *contents*, namely the rule of right; it is *lex* in respect of its *source*, namely its recognition and enforcement by the State. We see then how it is that so many words for law mean justice also; since justice is the content or subject-matter of law, and from such subject-matter law derives its title. We understand also how it is that so many words for law do not also mean justice; law has another side and aspect, from which it appears, not as justice realized and established, but as the means or instrument through which such realization and establishment is effected.

A priori we may presume that in the case of those terms which possess a twofold application, both ethical and legal, the ethical is historically prior, and the legal later and derivative. We may assume that justice comes to mean law, not that law comes to mean justice. This is the logical order, and is presumably the historical order also. As a matter of fact this presumption is, as we shall see, correct in the case of all modern terms possessing the double signification. In the case of *recht*, *droit*, *diritto*, *equity*, the ethical sense is undoubtedly primary, the legal secondary. In respect of the corresponding Greek and Latin terms (*jus*, τὸ δίκαιον) the data would seem insufficient for any confident conclusion. The reverse order of development is perfectly possible; there is no reason why lawful should not come to mean in a secondary sense rightful, though a transition in the opposite direction is more common and more natural. The significant fact is the union of the two meanings in the same word, not the order of development.

A second distinction between *jus* and *lex* is that the former is usually *abstract*, the second *concrete*. The English term law indeed combines both these uses in itself. In its abstract application we speak of the law of England, the law of libel, criminal law, law

and order, law and justice, courts of law. In its concrete sense, on the other hand, we say that Parliament has enacted or rejected a law. We speak of the by-laws of a railway company. We hear of the corn laws or the navigation laws. In foreign languages, on the other hand, this union of the two significations is unusual. *Jus*, *droit*, *recht* mean law in the abstract, not in the concrete. *Lex*, *loi*, *gesetz* signify, at least primarily and normally, a legal enactment, or a rule established by way of enactment, not law in the abstract. This, however, is not invariably the case. *Lex*, *loi*, and some other terms belonging to the same group have undoubtedly acquired a secondary and abstract signification in addition to their primary and concrete one. In medieval usage the law of the land is *lex terrae* and the law of England is *lex et consuetudo Angliae*. So in modern French *loi* is often merely an equivalent for *droit*. We cannot therefore regard the second distinction between *jus* and *lex* as essential. It is closely connected with the first, but, though natural and normal, it is not invariable. The characteristic difference between English and foreign usage is not that our *law* combines the abstract and concrete significations (for so also do certain Continental terms), but that the English language contains no generic term which combines ethical and legal meanings as do *jus*, *droit* and *recht*[1].

RECHT, DROIT, DIRITTO.—These three terms are all closely connected with each other and with the English *right*. The French and Italian words are derivatives of the Latin *directus* and *rectus*, these being cognate with *recht* and *right*. We may pretty confidently assume the following order of development among the various ideas represented by this group of expressions :—

1. The original meaning was in all probability *physical straightness*. This use is still retained in our *right* angle and *direct*. The root is RAG, to stretch or straighten. The group of connected terms, ruler, *rex*, *rajah*, regulate, and others, would seem to be independently derived from the same root, but not to be in the same line of development as right and its synonyms. The ruler or regulator is he who keeps things straight or keeps order, not he who establishes the right. Nor is the right that which is established by a ruler.

2. In a second and derivative sense the terms are used metaphorically to indicate moral approval—ethical rightness, not physical. Moral disapproval is similarly expressed by the metaphorical expressions wrong, tort, that is to say, crooked or twisted. These are metaphors that still commend themselves. The honest

[1] On the distinction between the concrete and abstract uses of *law* see Sir F. Pollock's First Book of Jurisprudence, pp. 14–18.

man is still the straight and upright man, and the ways of wickedness are still crooked. In this sense, therefore, *recht*, *droit*, and *diritto* signify justice and right.

3. The first application being physical and the second ethical, the third is juridical. The transition from the second to the third is easy. Law is justice as recognized and protected by the State. The rules of law are the rules of right, as authoritatively established and enforced by tribunals appointed to that end. What more natural, therefore, than for the ethical terms to acquire derivatively a juridical application? At this point, however, our modern English *right* has parted company with its Continental relatives. It has remained physical and ethical, being excluded from the legal sphere by the superior convenience of the English *law*. The distinction between the ethical and legal senses of the Continental terms is indicated by the use of the distinguishing adjectives natural and positive. *Naturrecht* is right, *positives Recht* is law.

4. The fourth and last use of the terms we are considering may be regarded as a derivative of both the second and third. It is that in which we speak of *rights*, namely, claims, powers, or other advantages conferred or recognized by the rule of right or the rule of law. That a debtor should pay his debt to his creditor is not merely right, it is *the* right of the creditor. Right is *his* right for whose benefit it exists. So also, wrong is *the* wrong of him who is injured by it. The Germans distinguish this last use of the term by the expression *subjectives Recht* (right as vested in a subject) as opposed to *objectives Recht*, namely, the rule of justice or of law as it exists objectively. The English right has been extended to cover legal as well as ethical *claims*, though it has, as we have seen, been confined to ethical *rules*.

A.S. RIHT.—It is worthy of notice that the A.S. *riht*, the progenitor of our modern *right*, possessed like its Continental relatives the legal, in addition to the ethical, meaning. The common law is *folc-riht*[1]. The divine law is *godes riht*[2]. A plaintiff claims property as 'his by *folc-riht*[3],' even as a Roman would have claimed it as being *dominus ex jure Quiritium*. The usage, however, did not prosper. It had to face the formidable, and ultimately successful, rivalry of the English (originally Danish) *law*, and even Norman-French, on its introduction into England, fell under the same influence. For a time, indeed, in the earlier books we find both *droit* and *ley* as competing synonyms[4], but the issue was never doubtful. The

[1] Thorpe's Ancient Laws and Institutes of England, i. 159. Laws of King Edward, pr.
[2] Ibid. i. 171. Laws of Edward and Guthrum, 6. [3] Ibid. i. 181. Oaths, 3.
[4] See e. g. Mirror of Justices (Selden Society's Publications, vol. vii), passim.

archaism of 'common right' as a synonym for 'common law' is the sole relic left in England of a usage universal in Continental languages.

EQUITY.—The English term equity has pursued the same course of development as the German *recht* and the French *droit*.

1. Its primitive meaning, if we trace the word back to its Latin source, *aequum*, is physical equality or evenness, just as physical straightness is the earliest meaning of right and its analogues.

2. Its secondary sense is ethical. Just as rightness is straightness, so equity is equality. In each case there is an easy and obvious metaphorical transition from the physical to the moral idea. Equity therefore is justice.

3. In a third and later stage of its development the word takes on a juridical significance. It comes to mean a particular portion of the civil law, that part, namely, which was developed by and administered in the Court of Chancery. Like *recht* and *droit* it passed from the sense of justice in itself to that of the rules in accordance with which justice is administered.

4. Fourthly and lastly, we have to notice a legal and technical use of the term equity, as meaning any claim or advantage recognized or conferred by a rule of equity, just as a right means any such claim or advantage derived from a rule of right. An equity is an equitable, as opposed to a legal, right. 'When the equities are equal,' so runs the maxim of Chancery, 'the law prevails.' So a debt is assignable 'subject to equities.'

JUS.—We have to distinguish in the case of *jus* the same three uses that have already been noticed in the case of *recht*, *droit*, and equity.

1. Right or justice. 'Id quod semper aequum ac bonum est jus dicitur,' says Paulus [1]. From *jus* in this sense are derived *justitia* and *justum*. It is often contrasted with *fas*, the one being human, and the other divine, right. *Jus*, however, is also used in a wider sense to include both of these—*jus divinum et humanum*.

2. Law. This is the most usual application of the term, the juridical sense having a much greater predominance over the ethical in the case of *jus*, than in that of its modern representatives *recht* or *droit*. *Jus* in its ethical signification is distinguished as *jus naturale*, and in its legal sense as *jus civile*. *Jus* is law in the abstract; unlike *recht* and *droit*, however, it is also used in the plural in a concrete sense. *Jura* means rules of law.

3. A right, moral or legal: *jus suum cuique tribuere* [2].

[1] D. 1. 1. 11.

[2] *Jus* is also used in various other derivative senses of lesser importance: e. g. a law court (*in jus vocare*), legal or rightful power or authority (*sui juris esse: jus et imperium*), legal decision, judgment (*jura dicere*). See Nettleship's Contributions to Latin Lexicography, sub voc. *Jus*.

The origin and primary signification of *jus* seem uncertain. It is generally agreed, however, that the old derivation from *jussum* and *jubere* is not merely incorrect, but an actual reversal of the true order of terms and ideas. *Jussum* is a derivative of *jus*. *Jubere* is, in its proper and original sense, to declare, hold, or establish anything as *jus*. It was the recognized expression for the legislative action of the Roman people. *Legem jubere* is to give to a statute (*lex*) the force of law (*jus*). Only in a secondary and derivative sense is *jubere* equivalent to *imperare* [1].

The most probable opinion is that *jus* is derived from the Aryan root YU, to join together (a root which appears also in *jugum*, *jungo*, and in the English *yoke*), and that *jus* in its original sense means that which is fitting, applicable, or suitable. If this is so, there is a striking correspondence between the history of the Latin term and that of the modern words already considered by us. The primary sense in all cases is physical; the ethical sense is a metaphorical derivative of this, and the legal application comes latest. The transition from the physical to the ethical sense in the case of the English *fit* and *fitting* is instructive in this connexion [2].

Δίκη. τὸ δίκαιον.—The Greek term which most nearly corresponds to the Latin *jus* is δίκη. These words cannot however be regarded as synonymous. The juridical use of *jus* is much more direct and predominant than the corresponding use of δίκη. Indeed we may say of the Greek term that it possesses juridical implications, rather than applications. Its chief uses are the following, the connexion between them being obvious: (1) custom, usage, way, (2) right, justice, (3) law, or at least legal right, (4) judgment, (5) a lawsuit, (6) a penalty, (7) a court of law. The primary sense is said to be that first mentioned, viz. custom. The transition is easy from the idea of the customary to that of the right, and from the idea of the right to that of the lawful. In the case of the Latin *mos* we may trace an imperfect and tentative development in the same direction [3]. Professor Clark, on the other hand, prefers to regard judgment as the earliest meaning of δίκη, the other ethical and legal applications being derivatives from this, and δίκη in the sense of custom being an independent formation from the original root [4]. Such an order of development seems difficult and unnatural. Analogy and the connexion of ideas seem to render more probable the order pre-

[1] See Mommsen's Staatsrecht, French translation by Girard, Manuel des Antiquités Romaines, vol. vi, part i. p. 353.

[2] See Clark's Practical Jurisprudence, p. 18. We owe to Professor Clark a very careful and scholarly investigation of the whole subject-matter of this article. See also Skeat's Etymological English Dictionary, sub voc. *just*; also Schmidt in Mommsen's Staatsrecht (Manuel des Antiquités Romaines, vol. vi. part i. p. 352, note 4).

[3] Nettleship, ibid., sub voc. *Mos*.

[4] Practical Jurisprudence, p. 51.

viously suggested, viz. custom, right, law, and finally the remaining legal uses [1].

Θέμις. θέμιστες.—As δίκη corresponds to *jus*, so θέμις apparently corresponds to *fas*. While *fas*, however, preserved its original signification as that which is right by divine ordinance, and never acquired any secondary legal applications or implications, the Greek term proved more flexible, and consequently has to be reckoned with in the present connexion. The matter is one of very considerable difficulty, and no certain conclusions seem possible, but the following order of development would seem to commend itself as the most probable.

1. *Θέμις*, divine ordinance, the will of the gods. The term is derived from the Aryan root DHA, to set, place, appoint, or establish, which appears also in *θεσμός*, a statute or ordinance [2]. This latter term, however, included *human* enactments, while *θέμις* was never so used. The Greek term is cognate with *thesis* and *theme*, and with our English *doom*, a word whose early legal uses I shall consider later.

2. *Θέμις*, right. The transition is easy from that which is decreed and willed by the gods to that which is right for mortal men to do.

3. *Θέμιστες*, the rules of right, whether moral or legal, so far as any such distinction was recognized in that early stage of thought to which these linguistic usages belong.

4. *Θέμιστες*, judgments, judicial declarations of the rules of right and law [3].

LEX.—So far I have dealt solely with those words which belong to the class of *jus*, that is, those which possess a double signification, ethical and legal. I proceed now to the consideration of the second class, represented by *lex*. And first of *lex* itself. The following are its various uses given in what is probably the historical order of their establishment.

1. Proposals, terms, conditions, offers made by one party and accepted by another [4]. Thus, *ea lege ut* [5], on condition that; *dicta*

[1] Δίκη is said to be derived from DIK, to show, point out, make known, this being itself a form of DA, to know; hence, practical knowledge, skill, the *way a thing is done, custom*. This suggestion might be considered ingenious, rather than convincing, were it not for the singular fact that the Teutonic languages exhibit a precisely similar process of thought. The English substantive *wise* means way, manner, and is yet the same word as *wise*, the adjective, and is derived from the root WID, to know. So also with the German *Weise* (way), *weisen* (to point out, direct), *weise* (wise). See Curtius, Grundzüge der Griechischen Etymologie, sub voc. Δικη. Skeat, sub voc. Wise, and List of Aryan Roots, §§ 145 and 372.

[2] Skeat, Aryan Roots, § 162.

[3] On the whole matter see Maine's Ancient Law, ch. I; Clark's Practical Jurisprudence, p. 42; Liddell and Scott, sub voc. *Θέμις*.

[4] Mommsen's Staatsrecht (Manuel des Antiquités Romaines, vol. vi. pt. i. p. 351); Nettleship, sub voc. *Lex*.

[5] Cited by Nettleship, sub voc. *Lex*.

tibi est lex[1], you knew the conditions; *his legibus*[1], on these conditions. So *leges pacis*[1] are the terms and conditions of peace: *pax data Philippo in has leges est*[1]. Similarly in law, *leges locationis* are the terms or conditions agreed upon between lender and borrower. So we have the legal expressions *lex mancipii*, *lex commissoria*, &c.

2. A statute enacted by the *populus Romanus* in the *comitia centuriata* on the proposal of a magistrate. This would seem to be a specialized application of *lex* in the first-mentioned sense. Such a statute is conceived rather as an agreement than as a command. It is a proposal made by the consuls and accepted by the Roman people. It is therefore *lex*, even as a proposal of peace made and accepted between victor and vanquished is *lex*. 'Lex,' says Justinian, 'est quod populus Romanus senatorio magistratu interrogante, veluti consule, constituebat[2].'

3. Any statute howsoever made—whether by way of authoritative imposition, or by way of agreement with a self-governing people.

4. Any rule of action imposed or observed, e.g. *lex loquendi*, *lex sermonis*. This is simply an analogical extension similar to that which is familiar in respect of the corresponding terms in modern languages, *law*, *loi*, *gesetz*.

5. Law in the abstract sense. *Lex*, so used, cannot be regarded as classical Latin, although in certain instances, as in Cicero's references to *lex naturae*, we find what seems a very close approximation to it. In medieval Latin, however, the abstract signification is quite common, as in the phrases *lex Romana*, *lex terrae*, *lex communis*, *lex et consuetudo*[3]. *Lex* has become equivalent to *jus* in its legal applications. This use is still retained in the technical expressions of private international law, *lex fori*, *lex domicilii*, &c.

It is possible that we have here an explanation of the very curious fact that so celebrated and important a word as *jus* failed to maintain itself in the Romance languages. Of the two terms *jus* and *lex*, bequeathed to later times by the Latin language, one was accepted (*loi* = *lex*) and the other rejected and supplanted by a modern substitute (*droit*, *diritto*). Why was this? May it not have been owing to that post-classical use of *lex* in the abstract sense, whereby it became synonymous and coextensive with *jus*? If *lex Romana* was *jus civile*, why should the growing languages of modern Europe cumber themselves with both terms? The survivor of the two rivals was *lex*. At a later stage the natural evolution of thought and speech conferred juridical uses on the ethical terms

[1] Cited by Nettleship, sub voc. *Lex*.
[2] Just. Inst. i. 2. 4.
[3] See Ducange, sub voc. *Lex*.

droit and *diritto* and the ancient duality of legal nomenclature was restored.

6. Judgment. This, like the last and like the three following uses, is a medieval addition to the meanings of *lex*. We have already seen the transition from law to judgment in the case of *jus*, δίκη and θέμις. *Legem facere* is to obey or fulfil the requirements of a judgment. *Legem vadiare*, the English wager of law, is to give security for such obedience and fulfilment [1].

7. The penalty, proof, or other matter imposed or required by a judgment: *lex ignea*, the ordeal of fire; *lex duelli*, trial by battle [2].

8. Legal rights, regarded collectively as constituting a man's legal standing or status. *Legem amittere* (in English to lose one's law) was in early English law an event analogous to the *capitis deminutio* and *infamia* of the Romans. It is a loss of legal status, a partial deprivation of legal rights and capacities [3].

Νόμος.—As δίκη corresponds to *jus* and θέμις to *fas*, so νόμος is the Greek equivalent of *lex*. We have to distinguish two uses of the term, one earlier and general, the other later and specialized.

1. Νόμος is used in a very wide sense to include any human institution, anything established or received among men, whether by way of custom, opinion, convention, law or otherwise. It was contrasted, at least in the language of the philosophers, with φύσις, or nature. That which is natural is τὸ φυσικόν; that which is artificial, owing its origin to the art and invention of mankind, is τὸ νομικόν. It is often said that the earliest meaning of νόμος is custom. The root idea, however, seems to be not merely that which is of old time, or that which is established by prescription, but that which is established, received, ordained or appointed in whatsoever fashion. Νόμος is *institutum*, rather than *consuetudo*.

2. Νόμος, in a later, secondary and specialized application, means a statute, ordinance or law. So prominent among human institutions are the laws by which men are governed, so greatly with increasing political development do the sphere and influence of legislation extend themselves, that the νόμοι became in a special and pre-eminent sense the laws of the State. Νόμος was a word unknown to Homer, but it became in later times the leading juridical term of the Greek language. The Greeks spoke and wrote of the laws (νόμοι), while the Romans, perhaps with a truer legal insight, concerned themselves with the law (*jus*). When, like Cicero, they write *de legibus*, it is in imitation of Greek usage.

Law.—Law is by no means the earliest legal term acquired by the English language. Curiously enough, indeed, it would seem

[1] Ducange, sub voc. *Lex*. [2] Ibid. [3] Ibid.

not even to be indigenous, but to be one of those additions to Anglo-Saxon speech which are due to the Danish invasions and settlements. Of the earlier terms the commonest, and the most significant for our present purpose, is *dom*, the ancestor of our modern *doom*[1]. A *dom* or *doom* is either (1) a law, ordinance or statute, or (2) a judgment. It does not seem possible to attribute with any confidence historical priority to either of these senses. In modern English the idea of judgment has completely prevailed over and excluded that of ordinance, but we find no such predominance of either meaning in Anglo-Saxon usage. The word has its source in the Aryan root DHA, to place, set, establish, appoint, and it is therefore equally applicable to the decree of the judge and to that of the lawgiver. In the Laws of King Alfred we find the term in both its senses. 'These are the dooms which Almighty God himself spake unto Moses and commanded him to keep[2].' 'Judge then not one doom to the rich and another to the poor[3].' In the following passage of the Laws of Edgar the laws of the Danes are plainly equivalent to the dooms of the English: 'I will that secular right stand among the Danes with as good laws as they best may choose. But with the English let that stand which I and my Witan have added to the dooms of my forefathers[4].'

Doom is plainly cognate to *θέμις*. The religious implication, however, which, in the Greek term, is general and essential, is, in the English term, special and accidental. In modern English doom is, like *θέμις*, the will, decree and judgment of Heaven—fate or destiny; but the Anglo-Saxon *dom* included the ordinances and judgments of mortal men, no less than those of the gods. *Θέμις*, therefore, acquired the sense of human law only derivatively through the sense of right, and so belongs to the class of *jus*, not of *lex*; while doom, like *θεσμός*, acquired juridical applications directly, and so stands beside *lex* and *νόμος*.

Dom, together with all the other Anglo-Saxon legal terms, including, strangely enough, right itself, was rapidly superseded by *lagu*, which is the modern *law*. The new term makes its appearance in the tenth century, and the passage cited above from the Laws of King Edgar is one of the earliest instances of its use. *Lagu* and law are derived from the root LAGH, to lay, settle or place. Law is that which is laid down. There is considerable conflict of opinion as to whether it is identical in origin with the Latin *lex* (*leg-*). Schmidt and others decide in the affirmative[5],

[1] See the New English Dictionary, sub voc. *Doom*.
[2] Thorpe's Ancient Laws and Institutes of England, vol. i. p. 55. Laws of King Alfred, § 49.
[3] Ibid. § 43. [4] Ibid. vol. i. p. 273. Laws of King Edgar, Supplement, § 2.
[5] Mommsen's Staatsrecht (Manuel des Antiquités Romaines, vol. vi. pt. i. p. 351 n).

and the probabilities of the case seem to favour such an opinion. The resemblance between law and *lex* seems too close to be accidental. If this is so, the origin of *lex* is to be found in the Latin *lĕgo*, not in its later sense of reading, but in its original sense of laying down or setting (as in the derivative *lectus*), which is also the primary signification of the Greek λέγω, the German *legen*, and of course the English *lay*[1]. If this is so, then law and *lex* are alike that which is laid down, just as *Gesetz* is that which is set (*setzen*). This interpretation is quite consistent with the original possession by *lex* of a wider meaning than statute, as already explained. We still speak of laying down terms, conditions, and propositions, no less than of laying down commands, rules and laws[2].

It is true indeed that by several good authorities it is held that the original meaning of *lagu* and law is that which lies, not that which has been laid or settled—that which is customary, not that which is established by authority[3]. The root LAGH, however, must contain both the transitive and the intransitive senses, and I do not know what evidence there is for the exclusion of the former from the signification of the derivative *law*. Moreover, there seems no ground for attributing to *lagu* the meaning of custom. It seems from the first to have meant the product of authority, not that of use and wont. It is *statutum*, not *consuetudo*. As soon as we meet with it, it is equivalent to *dom*. The analogy also of *lex*, *gesetz*, *dom*, θεσμός, and other similar terms is in favour of the interpretation here preferred.

JOHN W. SALMOND.

[1] See Smith's Latin Dictionary, sub voc. *lego*. Liddell and Scott, sub voc. λέγω.
[2] *Lex* is otherwise and variously derived from or connected with *ligare*, to bind (Nettleship); *legere*, to read (Clark, p. 31); λέγειν, to say or speak (Muirhead's Historical Introduction to the Private Law of Rome, p. 19).
[3] Skeat, sub voc. *Law*; Clark, p. 68.

THE RENEWAL OF SETTLED LEASEHOLDS.

THE number of leases for terms of years determinable, or not determinable, with lives, renewable periodically on payment of fines, or other conditions, must be very much less than it was some half-century ago. Ecclesiastical and collegiate bodies from whom property was thus held have through legislative action, amongst other reasons, ceased to grant renewable leases with that freedom which once prevailed.

Nevertheless there is still in all probability no inconsiderable portion of land held in this way, and the subject remains an important one to those trustees who hold it in trust.

The 19th section of the Trustee Act, 1893[1], deals with the matter in the following terms:—

'19. *Power of trustees of renewable leaseholds to renew and raise money for the purpose.*—(1) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of the money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

[1] This section is to the same effect as the 8th and 9th repealed sections of Lord Cranworth's Act.

(3) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.'

On reference to leading Conveyancing precedents it would appear to be the practice to rely on the provisions of the statute law [1], which in its turn apparently assumes the application of rules and principles established by the decisions of Equity judges [2] which are dealt with in Lewin on Trusts, by Mr. Godefroi's book on that subject, by Mr. Vaisey in his work on Settlements, and, in the writer's opinion, best of all in Davidson's Conveyancing [3].

In this article it is proposed to discuss the general principles of this subject, and those lawyers who may be called upon to advise trustees or their beneficiaries will find the path by no means clear.

The governing principle that the expenses of renewing leases shall be borne by tenant for life and remainder-man according to their interest in the property has been declared in a number of cases. It will be sufficient to quote Vice-Chancellor Leach in *Earl of Shaftesbury* v. *Duke of Marlborough* (1833) [4]. 'It is now settled upon equitable principles that expense of renewals must be borne by the tenant for life and those in remainder in the proportion of the benefit which they respectively derive from such renewals.'

Another leading principle which is not so apparent, but has probably influenced the former tendency of the Court in leaning to a construction which would charge the costs of renewal on the income of the property rather than on capital, is to ensure, so far as may be, that the share of the debt incurred for renewals attributable to the tenant for life shall be repaid by him before his interest in the property ceases.

The importance of keeping this in view was referred to by Lord Loughborough in *White* v. *White* (1798) [5], who after stating the usual rule that the tenant for life must keep down the interest of charges on the estate remarks: 'He is further bound to have charged upon him a due proportion of the benefit he takes in the estate by the application of the principal paid for the purchase of the renewed interest in the estate.'

Bearing these considerations in mind the trustee will next inquire, How is the sum necessary for payment of fines and other expenses attending the renewal to be provided?

[1] Davidson's Conveyancing, vol. iii, part 2, contains more elaborate provisions than other Precedent authorities.

[2] But see Davidson and reference to *Playters* v. *Abbott* at p. 623 of above volume.

[3] Vol. iii, part 1, p. 605.

[4] 2 Myl. & Keen, 111, 39 R. R. 153.

[5] 4 Vesey, 24. 4 R. R. 179.

It may happen that the tenant for life is in a position to find the necessary funds. In that case he, or his estate, will have a lien on the property for the amount which may be found to be due to him by the remainder-man. The position of the life-owner in these circumstances is clearly defined by the judgments of the Lord Justices Page-Wood and Selwyn in *Bradford* v. *Brownjohn* (1868)[1].

This case establishes the rule that a tenant for life has a charge for the amount provided by him with compound interest[2] until his life estate ceases and with simple interest thereafter, but of course with a proportionate deduction in case the life owner has lived to enjoy any part of the renewed term.

The chief difficulty in the case last cited was whether simple or compound interest should be paid until the death of the tenant for life. Vice-Chancellor Stuart had decided that the former rate was due, but the Lord Justices affirmed the rule that the interest should be compound, upon the ground that the position was that of a purchase of a reversion and that 'Interest is to be calculated with annual rests upon the same principle as interest calculated upon reversionary estates.'

Whether in the event of a trustee or remainder-man providing the renewal fund he would in accordance with this decision be in the same position as the tenant for life as regards compound interest does not appear to have been decided, but it is not easy to see why his position should differ from that of a tenant for life, for in effect, whether trustee or remainder-man, he is just as much buying a reversionary interest for the benefit of the trust as a tenant for life, and it may be observed that if any of these parties wishes to prevent the accumulation of compound interest he can ask for a sale if he has the right to sell, which is generally now the case.

The next question to be considered is, How is the trustee to raise the renewal fund in case he does not provide it 'out of any money then in his hands in trust' (see clause 1 of the Act). In this event the amount will be raisable by mortgage of the property comprised in the renewed lease, or of 'any other hereditaments for the time being' subject to the same trusts (see clause 2 of the Act).

In case 'the other hereditaments' are thus mortgaged, then the tenant for life would appear to be only liable to keep down the interest on the mortgage money if Lord Romilly's ruling in *Ainslie* v. *Harcourt* (1860)[3] is correct. In that case an independent property was directed by the terms of the trust to be charged with the expenses of renewing leaseholds held under the same trusts,

[1] L. R. 3 Ch. 711.

[2] Whether the rate should be three or four per cent. is uncertain in the present doubtful state of the authorities; probably the former rate. *Re Barclay*, '99, 1 Ch. 674.

[3] 28 Beav. 313.

and the tenant for life was decreed to only keep down the interest. The justice of this is not apparent, for if the tenant for life has only to keep down the interest he escapes paying his share of the principal, which therefore falls on the remainder-man when he comes into possession of the renewed lease and of the independent property mortgaged to pay costs incident to the former.

This decision if applied generally would seem to involve a direct violation of what is conceived to be a fundamental principle of the law relating to the subject of this article, and, it is with submission suggested, would not be followed by the Court as a general rule.

The question may be raised by a careful trustee whether it might not be practicable to make a deduction annually from the rents and profits during the tenancy for life, and invest the money with a view to providing a fund when the period of renewal is reached. That this can be done when the cost of renewal is by the trust instrument thrown only on income was decided by Lord Eldon, but when that burthen has to be borne both by capital and income it would be obviously unfair to lessen against his wish the income of a life owner in order to provide a renewed lease which he may never live to enjoy.

On this question it will be sufficient to quote from the judgment of Vice-Chancellor Hall in *Isaac* v. *Wall* (1877)[1], who observed, 'There must be something very special in the settlement to charge a tenant for life prospectively with renewals when possibly he may never get any advantage therefrom.'

It will be seen that there is a saving clause in the Act above quoted which negatives a trustee's authority under the statute in case the trust expressly forbids it, and he has under the same clause no authority 'if he omit to do anything which he is in express terms directed to do by the instrument creating the trust.'

This would appear to leave untouched the rights of the parties where the trust directs payment of the renewal fund out of income only[2]. The tendency of the Court was formerly to infer an intention to charge income only with the cost of renewal, but it will be seen that a direction 'to pay out of rents and profits' is only machinery for raising the necessary funds, and need not affect the adjustment of the burthen between life owner and remainder-man.

Mr. Lewin[3] wrote on this point—

'The present leaning of the Courts would appear therefore to be to consider the language of the instrument as directing only a temporary mode of raising the fines without prejudice to the

[1] 6 Ch. D. 706.

[2] The object of the Act of 1893 was not to alter the law between tenant for life and remainder-man, *Re Baring*, '93, 1 Ch. 61, per Kekewich J.

[3] Lewin on Trusts (10th ed.), p. 427.

ultimate equitable adjustment according to the principles now acted upon in Equity in ordinary cases.'

The broad principle that the burthen of renewal is to be borne between life owner and remainder-man in proportion to his interest in the property being clearly settled, the next question is, How is that apportionment to be made?

If the renewed leasehold is not determinable with lives, being, that is, for a definite term, no difficulty will probably arise. The tenant for life will keep down the interest on the amount raised to renew, and in addition out of the income there will be deducted annually during each year in which the life owner will benefit by the renewal the amount to be returned by him as principal, calculated by dividing the principal sum by the number of years the renewed lease has to run.

In this case of leases not held on lives it might be found convenient to arrange a mortgage with a building society, or some similar lender, for return of both principal and interest by instalments within the necessary period of repayment.

But when the question of apportionment has to be made in regard to leaseholds determinable with *lives*, difficulty arises owing to the decision of Vice-Chancellor Wigram in *Jones* v. *Jones* (1846)[1], who stated, 'The rule is that the parties are to pay in proportion to their enjoyment, by which I understand their actual enjoyment to be meant, and not an extent of enjoyment to be determined by mere speculation or by a calculation of probabilities'; but, as Mr. Davidson remarks[2], 'how are the tenant for life and remainder-man to divide in proportion to their enjoyment a fine paid for the addition of a life which expires before that of the prior *cestuis-que-vie*?'

Mr. Justice Kekewich in a recent case[3] directed an actuarial valuation of an anticipatory nature, apparently disregarding the rule above stated, which does not appear to have been referred to, and the only way, if any real difficulty occurs, to protect the parties concerned would seem to lie in an application to the Court.

Having ascertained the amount the tenant for life has to contribute, the next question is, How is his share of the principal sum raised to be secured?

Two modes have been followed by the Court: (1) insurance on the life of the tenant for life for the amount of his share of the principal sum; or (2) security given by him for that amount.

If the insurance plan is adopted reference may be had by way of example to the order made in *Reeves* v. *Creswick* (1839)[4], where

[1] 5 Hare, 440. [2] Vol. iii, Davidson's Conveyancing (1873), p. 614.
[3] *Re Baring*, '93, 1 Ch. 61. [4] 3 Y. & C. 716.

the share of principal due by the tenant for life was directed to be insured upon her life for the purpose of providing that sum upon her decease, and the policy was ordered to be assigned to the mortgagee, and directions were given for paying the premiums and keeping down the interest on the principal.

The other alternative, which is obviously very inconvenient and was apparently only suggested in default of a better mode, has been followed in several cases [1].

It is purposed to conclude this article by a summary of those rules applicable to its subject which have been referred to in the previous pages.

(1) The governing principle in the renewal of leases in settlement is that (*a*) the cost of renewal must be borne by the tenant for life and remainder-man in proportion to their respective enjoyment; and (*b*) the former must keep down the interest on the sum raised and repay, unless impracticable, his share of principal before his estate in the property ceases. It is urged that the latter part of this rule should apply to a charge on an independent property held on the like trusts notwithstanding *Ainslie* v. *Harcourt*.

(2) If the life owner finds the money he has a lien for it, and his position is that defined by the Lord Justices in *Bradford* v. *Brownjohn*, and it is submitted as a result of that decision that a trustee, or remainder-man, as well as a tenant for life is entitled to compound interest.

(3) That a deduction from the income of a tenant for life, unless income only is liable, or unless with his consent, in order to provide a fund for anticipatory renewals, is not allowable.

(4) The Trustee Act, 1893, has not altered the previous law regulating renewals, one rule settled by later decisions being to adjust the burthen between life owner and remainder-man, although the machinery employed may consist of a charge primarily raisable out of rents and profits.

(5) That the rule stated in *Jones* v. *Jones* of apportionment according to actual enjoyment is in many cases an unattainable principle of justice which the Court will not insist upon as an absolute rule [2].

(6) The amount apportionable to the tenant for life in respect of the principal debt incurred is raisable by (*a*) insurance or (*b*) by the taking of security from him.

W. STRACHAN.

[1] *Jones* v. *Jones* (1846), 5 Hare, 440; *Carter* v. *Sebright* (1859), 26 Beav. 374.

[2] Mr. Davidson, vol. iii, part 1, p. 615, says: 'Every method for apportioning the fine on renewal for LIVES must involve a calculation of value by anticipation and not merely according to enjoyment.'

ESTOPPEL BY NEGLIGENCE.

THE subject of 'Estoppel by Negligence' is in a most confused and peculiar condition. Rules and amendments of rules have been devised and elaborated by the judges; the authors have been quoting, applying, and illustrating those rules[1]; and yet the principal writers on estoppel are far from sure whether cases of estoppel by negligence can exist. If possible, at least they 'must be uncommon[2]'; and 'It may be going too far to say that, in the nature of things there can be no such case[3].' The present writer believes that, with the help of some short preliminary investigations, the subject can be made intelligible.

Negligence. Before entering upon an exposition of the subject, it is essentially necessary that we should arrive at an understanding of the sense in which the word 'negligence' is being used.

It is to be regretted that the connotations of the term lead off in two different directions. On the one hand, all neglect of duty is negligence; and embraces therefore intended wrong. Upon the other hand the action of negligence is usually considered as being limited to that class of cases in which the act complained of has been due rather to carelessness than to intention.

Confusion has arisen from this double signification of the word. In one case[4] for example Lord Eldon spoke of—

'that gross negligence that amounts to evidence of a fraudulent intention.'

Of which Fry L.J. said[5] that the expression was—

'certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud, and leads men to do, or omit doing something, not carelessly but for a purpose.'

Lack of care is the more frequent signification of the word 'negligence'; and the action of negligence is based upon that meaning of the term. Sir Frederick Pollock says[6]:—

[1] Bigelow on Estoppel, 5th ed., 653-9; Cababé on Estoppel, 93-104; Everest and Strode on Estoppel, 353-370; Smith's Leading Cases, 8th ed., 907-911; Beven on Negligence, 2nd ed., 1568-1649; Addison on Torts, 6th ed., 745; Lindley on Companies, 5th ed., 486; &c., &c.

[2] Bigelow, 5th ed., 653.

[3] Cababé on Estoppel, 10.

[4] *Evans* v. *Bicknell*, 1801, 6 Ves. 190.

[5] *Northern Counties* v. *Whipp*, 1884, 26 Ch. D. 489; 53 L. J. Ch. 620.

[6] On Torts, p. 433.

'If a man will set about actions attended with risk to others, the law casts on him the duty of *care* and competence. . . . From this root we have, as a direct growth, the whole modern doctrine of negligence.'

We see, therefore, that when we speak of an action of negligence the word 'negligence' is not used as synonymous with all breach of duty, but in the sense of carelessness in the discharge of some duty. If it meant all breach of duty, the action of negligence would embrace the whole field of torts, and, historically, of contracts also, whereas in reality it is an action for carelessness in the discharge of some duty merely. Our ideas would be clarified were we to use the terms negligence and carelessness to express the two ideas, for at present, we either risk misconception, or we have to explain, when using the word negligence, in what sense it is employed. For example Sir Frederick Pollock, affirming that—

'*Culpa* is exactly what we mean by "negligence," the falling short of the *care* and circumspection which is due from one man to another [1].'

'Thus we arrive at the general rule that every one is bound to exercise due *care* towards his neighbours in his acts and conduct; or rather, omits or falls short of it at his peril [2]'—

places 'negligence,' in his classification of torts, as a subdivision of 'Group C [3].' But negligence, in the wider sense of the breach of duty, would embrace all torts and not constitute merely a sub-division of them. Perhaps it would be better to confine negligence to the generic use of the word, and adopt carelessness for the specific sub-division.

Mr. Beven's book on 'Negligence,' too is not a survey of all the cases in which there is a breach of duty as from its title one might expect, but is—

'primarily occupied with considering *defaults in conduct*, and only secondarily with the adequate discharge of obligations. It deals with an aspect, not with a division, of law. A complete treatise on negligence in law would be a commentary on the whole law of England, from the standpoint of a non-fulfilment of legal duties, excluding only intentional wrongdoing [4].'

Having thus determined that the action of negligence (or better, carelessness) is, in reality, but one of various classes of actions for

[1] On Torts, p. 17.

[2] P. 353, 'Negligence is the absence of care, according to the circumstances': Willes J. in *Vaughan* v. *Taff Vale Railway*, 1860, 5 H. & N. p. 688; 29 L. J. Ex. 247.

[3] Pollock on Torts, p. 7. The cases treated of under that title are those which are embraced within the rule that 'One who enters on the doing of anything attended with risk to the persons or property of others, is held answerable for the use of a certain measure of *caution* to guard against that risk.' Ib. 353.

[4] 2nd ed., p. 3.

neglect of duty (that is of negligence) we may define carelessness, when it arises in connection with duty, as—

'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do[1].'

Estoppel by Carelessness. We are now ready for the statement that estoppel by negligence means estoppel by carelessness—that is by

'the omission to do something which a reasonable man . . . would do, or doing something which a prudent and reasonable man would not do';

it being understood, of course, that such carelessness is in breach of some duty, arising out of contract, relationship, or otherwise.

Following the lead of Mr. Justice Lindley[2] then, and actuated by the considerations just referred to, 'estoppel by negligence' will hereafter be referred to as 'estoppel by carelessness.' The change will enable us to get rid of the idea that we are speaking of estoppel with reference to all breaches of duty. We are dealing with 'an aspect, not with a division, of the law[3].'

Misrepresentation. Note next that, in estoppel carelessness is only important when it is associated with misrepresentation. Carelessness without misrepresentation may indeed give rise to an action for negligence. But for estoppel you must say that you were misled by some falsity, and that your opponent ought to be precluded from asserting the facts, because of his action or inaction —that is by the carelessness of which you complain.

Personal and Assisted Misrepresentation. The only other preliminary necessary to consideration of the main question, is the observation of the distinction between personal and assisted misrepresentation. I hold myself out as a partner, and am estopped from denying membership in the firm—that is personal misrepresentation. A mortgagee hands over the title-deeds to the mortgagor, who uses them as evidence of the truth of *his* (the mortgagor's) representation of unencumbered ownership, and so misleads an innocent purchaser; and the *mortgagee* is estopped. But not, observe, because of any misrepresentation made by him, but because merely of the

[1] Per Alderson B. in *Blyth* v. *Birmingham*, 1856, 11 Ex. 784; 25 L. J. Ex. 213. And see per Brett J. in *Smith* v. *London, &c., Railway*, 1870, 5 C. P. D. 102; 39 L. J. C. P. 68. 'There is no absolute, or intrinsic, negligence; it is always relative to some circumstances of time, place, or person': Per Bramwell B. in *Degg* v. *Midland Railway*, 1857, 1 H. & N. 781; 26 L. J. Ex. 151.

[2] On Companies, 5th ed., 486.

[3] Using 'negligence' in its wider signification, every case of estoppel would be one of 'Estoppel by Negligence,' for there could in no case be the penalty of estoppel unless there had been some breach of duty—something *wrong* done.

assistance which he has rendered to the misrepresentation of the mortgagor—he has furnished an opportunity for fraud; he has done that which has made the misrepresentation of another person credible [1].

Personal Misrepresentation. No instances of estoppel by carelessness are to be found in this class of cases. The assertion is not intended that every case of personal misrepresentation is the result of evil intent, and that there are no instances in which misrepresentation is not due to carelessness rather than to dishonesty. What is meant rather is that personal misrepresentation will estop, whether it is due to one cause or the other; and that consideration of, How the representation came to be made?—whether through carelessness or intention—is therefore immaterial.

For example, a trustee of a fund, with a view to deceive, represents that the fund is uncharged; and he is estopped from asserting otherwise. But if he had made the same representation in perfect good faith but carelessly (having for the moment forgotten), he would have been likewise estopped [2]. Again, were there both the presence of good faith and the absence of carelessness (which might happen in some cases by the misrepresenter being himself fraudulently misled), yet even in that case there would be estoppel [3]. The element of carelessness, therefore, is immaterial where the misrepresentation is personal.

'The man who has made the misrepresentation under whatever circumstances must bear the consequences of those representations, and not the man who has trusted to the representations so made [4].'

Assisted Misrepresentation. It is in this class of cases then, if at all, that instances of estoppel by carelessness are to be found. But hitherto the existence of the class itself has not been sufficiently recognized, nor has it till now received a distinguishing name. And it is therefore not matter for much surprise that that of which we are in search has not been with precision disentangled, nor its true affinities observed.

As in cases of personal misrepresentation, so also in those of assisted misrepresentation, the general rule regards merely the act done, and is entirely indifferent to the motive or reason for it, or the carelessness or diligence that may be in it.

[1] *Waldron* v. *Sloper*, 1852, 1 Dr. 193; *Farrand* v. *Yorkshire, &c.*, 1888, 40 Ch. D. 182; 58 L. J. Ch. 238.

[2] *Burrowes* v. *Lock*, 1805, 10 Ves. 470.

[3] Per *Lord Selborne in Bank of England* v. *Vagliano*, '91, A. C. 123; 68 L. J. Q. B. 145; *Ellis* v. *Schmoeck*, 1829, 5 Bing. 521; 7 L. J. Q. B. 231; *Collingwood* v. *Berkeley*, 1863, 15 C. B. N. S. 145; *Maddick* v. *Marshall*, 1864, 16 C. B. N. S. 387; 17 ib. 829.

[4] Per James L.J. in *Hunter* v. *Walters*, 1871, L. R. 7 Ch. 75. And see per Lord Cairns in *Reese* v. *Smith*, 1869, L. R. 4 H. L. 64; 39 L. J. Ch. 849; and per Jessel M.R. in *Eaglesfield* v. *Londonderry*, 1876, 4 Ch. D. 704.

'The rule is that if a man so conducts himself *whether intentionally or not*, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it [1].'

For example, if a company were to issue a false certificate as to ownership of shares, upon the faith of which a third person changed his position, it would be estopped whether wrongful intent or mistake (careless or otherwise) underlay the act [2].

Close inspection, however, of the category of assisted misrepresentation will discover at least three lines of cases in which the operation of estoppel by carelessness may be observed. Not that the principles by which most of the cases have been decided have any relation to estoppel—indeed quite other principles and rules have been invoked. Nevertheless the present writer believes that his *ratio decidendi* will be readily accepted, can he but clearly present it to the profession.

Acceptance unfortunately involves something of a bouleversement: to what extent it may be as well frankly at once to indicate:—

1. Although no case of estoppel by carelessness has been discovered, yet there are at least three classes of them; two passing at present under other designations and one existing by statute.

2. And there is a fourth, from which the majority of the judges exclude all questions of carelessness; but which the present writer would leave in almost sole possession of the field.

3. Of the rules formulated by the judges for estoppel by carelessness, one applies to all sorts of estoppel by misrepresentation, and the others do not and cannot apply to estoppel by carelessness at all.

1. *Execution of Documents.* Opening the first class of cases in which estoppel by carelessness may be found, suppose that a man is tricked into executing a document which is afterwards by the knave passed on to an innocent transferee, who is to lose, and why?

The present law dividing the cases into void and voidable documents (so much fraud—amount very uncertain—and the document is voidable, more fraud and the document is altogether void) declares that if the document be voidable only its creator must suffer; if it be void the loss falls on the innocent transferee [3]. And

[1] *Cornish* v. *Abington*, 1859, 4 H. & N. 556; 28 L. J. Ex. 262; *West* v. *Jones*, 1851, 1 Sim. N. S. 207.

[2] *Re Bahia, &c.*, 1868, L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; *Re Ottos, &c.*, 189_, 1 Ch. 618; 62 L. J. Ch. 166; *Balkis* v. *Tomkinson*, 1893, A. C. 396; 63 L. J. Q. B. 134.

[3] *Kennedy* v. *Green*, 1834, 3 M. & K. 713; *Vorley* v. *Cooke*, 1857, 1 Giff. 230; 27 L. J. Ch. 185; *Ogilvie* v. *Jeaffreson*, 1860, 2 Giff. 353; 29 L. J. Ch. 905; *Foster* v. *McKinnon*, 1869, L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Hunter* v. *Walters*, 1871, L. R. 7 Ch. 82; 41 L. J. Ch. 175.

the discussion for the most part expends itself upon distinctions between cases in which the dupe was deceived as to the actual contents of the document, and in others as to its legal effect[1]; between cases in which the deception was as to the land affected by the document, and in others as to the disposition made of it[2] and so on. The character of the dupe, whether he is 'layman or lettered[3]'; the character of the occasion, whether it was one 'in which no extraordinary caution was necessary[4]'; and similar points are also referred to, but in order for the most part to ascertain whether the document is void or voidable.

Here and there indeed, the applicability of estoppel is to be noted. For example, Mellish J. in 1871 declared it to be 'a doubtful question of law' whether the dupe 'may not by executing it negligently be estopped[5]'; and Erle C.J., in a case in which blank but executed transfers of shares were improperly filled up, said that although they were originally—

'null and void, yet as between Swan and a purchaser . . . they may be valid to pass the property, if not directly yet indirectly by estopping Swan from setting up his right[6].'

To the present writer the matter assumes the following form:—No document obtained by misrepresentation (whether it be the vilest, the most complex, the most simple, or the most innocent) is binding upon the dupe; its character remains constant (it cannot change) accompanying it into whatsoever remotest hands it may come; nevertheless as against persons who have been led by the document to change their position the dupe ought to be estopped from denying its validity. The authorities declare that negligence on the part of the dupe is an essential part of the case against him. If so then the estoppel occurs where carelessness exists; and we thus have an instance of estoppel by carelessness.

2. *Priorities.* The second existing class of cases may be typified by the mortgage case already referred to: A mortgagee hands over the title-deeds to the mortgagor upon some trumped-up excuse; and the mortgagor, fraudulently using them as evidence of his assertion of unencumbered ownership of the property, conveys it to an innocent purchaser. The present writer would say that in all such cases the mortgagee ought to be estopped from setting up his title to the property. The decisions however distinguish

[1] *Vorley* v. *Cooke*, 1857, 1 Giff. 230; 27 L. J. Ch. 185; *Herchmer* v. *Elliott*, 1887, 14 Ont. 714.
[2] *National* v. *Jackson*, 1886, 33 Ch. D. 1.
[3] *Thoroughgood's* case, 1582, 2 Rep. 9 a.
[4] *Ogilvie* v. *Jeaffreson*, 1860, 2 Giff. 353; 29 L. J. Ch. 905.
[5] *Hunter* v. *Walters*, L. R. 7 Ch. 82; 41 L. J. Ch. 175.
[6] *Swan* v. *N. B. A.*, 1859, 7 C. B. N. S. 400.

between cases in which his conduct was reasonable and those in which it was negligent[1]. And thus again is there estoppel by carelessness.

But the principles usually applied in such cases are not those of estoppel. The rule that 'possession of the deeds gives the better equity' is that most usually invoked[2]. Giffard V.C., however, properly protests that mere possession of the deeds will not give priority.

'There must be some act or default on the part of the first mortgagee to have this effect[3].'

And Fry L. J. has declared the law to be:—

'That the Court will postpone the prior legal estate to a subsequent equitable estate when the owner has *assisted in* or connived at the fraud which has led to the creation of a subsequent equitable estate[4].'

Estoppel is at the foundation of such language: the owner of the first estate is first; but he is estopped from so saying.

3. For the third class of cases we are indebted to legislation. Suppose that a shipowner issues a bill of lading for goods not shipped; and that the bill is transferred for value to a bona-fide purchaser, who should lose, the signer of the bill or the purchaser of the goods? Our general rule[5] would condemn the signer 'whether intentionally or not' he led the purchaser to infer the existence of the goods. By statute however[6]

'the master or other person signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fault of the shipper, or of the holder, or some person under whom the holder claims.'

In the United States authorities differ, but probably the weight of them is in favour of the proposition that the shipowner will be estopped by signing a false bill of lading whether he was careful or negligent[7]. In England the estoppel is founded upon carelessness.

4. *Bills and Notes.* The authorities have excluded all questions of carelessness from a class of cases in which there is strong minority opinion for asserting that it ought to play a most important part. According to the decisions the acceptor of a bill may leave spaces

[1] *Evans* v. *Bicknell*, 1801, 6 Ves. 174; *Waldron* v. *Sloper*, 1852, 1 Dr. 193; *Clarke* v. *Palmer*, 1882, 21 Ch. D. 124; 51 L. J. Ch. 634; *Newman* v. *Newman*, 1885, 28 Ch. D. 684; 54 L. J. Ch. 598.

[2] *Goodtitle* v. *Morgan*, 1787, 1 T. R. 762; *Layard* v. *Maud*, 1867, L. R. 4 Eq. 397, 406; 36 L. J. Ch. 669; *Spencer* v. *Clark*, 1878, 9 Ch. D. 142; 47 L. J. Ch. 692; *Lloyd* v. *Jones*, 1885, 29 Ch. D. 229; 54 L. J. Ch. 931.

[3] *Thorpe* v. *Houldsworth*, 1868, L. R. 7 Eq. 139.

[4] *Northern Counties* v. *Whipp*, 1884, 26 Ch. D. 482, 494; 53 L. J. Ch. 629.

[5] Ante, p. 388.

[6] 18 & 19 Vic. (Imp.) c. 111, s. 3.

[7] Porter on Bills of Lading, §§ 432–5.

in it which would tempt the virtue of many an one who would shrink from bolder feats of forgery [1]; he may attach conditions in lead pencil, or upon marginal spaces, and if they are rubbed out or cut off throw the ensuing loss upon the shoulders of the innocent purchasers of them [2]; and he may leave signed notes or executed blanks where they may easily be picked up, and swear that he did not think that anybody would avail himself of them,

'and that, too, though the acceptor or maker may have made the theft or fraud easy by putting the paper in an unlocked drawer in a desk to which clerks and servants and others had access [3].'

There is, no doubt, the case of *Young* v. *Grote* [4], in which the duty of carefulness as to tempting spaces is imposed upon the drawer of a cheque; and the case of *Ingham* v. *Primrose* [5] according to which if you wish to destroy your acceptance you ought to do it effectively, and not merely by tearing it in half which would give it the appearance of separation for safe transmission merely; but these cases are far from having that subsequent sanction which the present writer could wish them. There are also some comforting cases in the Pennsylvania courts [6]. The majority opinion, however, is that of Lord Halsbury [7]:—

'People are not supposed to commit forgery . . . the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery but the law of the land.'

The present writer, bearing in mind the general rules relating to social relations, would rather agree with Mr. Justice Blackburn and others who hold that—

'The person putting in circulation a bill of exchange does by the law merchant owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations of it [8].'

Were this the law, then breach of it would furnish a clear case of estoppel by carelessness. For we would have to say, not that the forged acceptance was that of the defendant, but that by his carelessness he was estopped from denying it.

[1] *Scholfield* v. *Londesborough*, 1894, 2 Q. B. 660; 1895, 1 Q. B. 536; 1896, A. C. 514; 63 L. J. Q. B. 649; 64 ib. 293; 65 ib. 593.

[2] *Harvey* v. *Smith*, 1870, 55 Ill. 224; *Zimmerman* v. *Rote*, 1874, 75 Pa. St. 188; *Cochrane* v. *Nebeker*, 48 Ind. 459; *Walsh* v. *Hunt*, 1898, 52 Pac. Rep. 115; *Swaisland* v. *Davidson*, 1883, 3 Ont. 320.

[3] Bigelow on Bills & Notes, 177.

[4] 1827, 4 Bing. 253; 5 L. J. C. P. 165; 12 Moo. 484.

[5] 1859, 7 C. B. N. S. 82; 28 L. J. C. P. 294.

[6] *Brown* v. *Reed*, 1875, 79 Pa. St. 370; *Leas* v. *Walls*, 1882, 101 Pa. St. 57; *Robb* v. *Pennsylvania, &c.*, 1898, 40 Atl. Rep. 969.

[7] *Scholfield* v. *Londesborough*, 1898, A. C. 532; 65 L. J. Q. B. 601.

[8] *Swan* v. *North British*, 1863, 2 H. & C. 183; 32 L. J. Ex. 277. The present writer would not however invoke the law merchant.

The Leading Cases.

Passing on to consider the rules framed for estoppel by negligence a short statement of the facts in the two leading cases, and a citation of the rules in judicial language will be of advantage.

1. 1855, *Bank of Ireland* v. *Evans*[1]. The secretary of a company having been allowed the custody of the seal, fraudulently affixed it to powers of attorney for the transfer of bank shares owned by the company. In an action between the company and the bank, which had acted upon the transfers, Parke B. said:—

'It is clear, we think, that the negligence in the present case, if there be any, is *much too remote* to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney . . . We concur with Mr. Justice Jackson, and Justices Ball, Compton, and Towns, and the Chief Justice Leroy, in thinking that the negligence which would deprive the plaintiffs of their right to insist that the transfer was invalid, must be *negligence in, or immediately connected with the transfer itself*[2].'

2. 1859, *Exparte Swan*[3]; 1862, *Swan* v. *N. B. A. Co.*[4]. The owner of shares in two companies *A* and *B*, employed a broker to sell those in *A*, and gave him ten executed transfer forms in blank. The broker fraudulently used two of them to transfer the *B* company shares, stealing the certificates to enable him to accomplish his purpose. Company *B* acted upon these transfers, and in the action between it and the original owner of the shares, it was held that the owner was not estopped from denying the execution of the transfer. Baron Wilde, in the Exchequer, formulated a rule as follows:—

'That if he has led others into the belief of a certain state of facts by conduct of culpable neglect, calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that that state of facts did not exist.'

Upon appeal[5] Blackburn J., referring to Baron Wilde's language, said as follows:—

'This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the *neglect must be in the transaction*

[1] 5 H. L. C. 389. See a similar case, *Merchants, &c.*, v. *Bank of England*, 1887, 21 Q. B. D. 160; 57 L. J. Q. B. 418. But see *Shaw* v. *Port Philip*, 1884, 13 Q. B. D. 103; 53 L. J. Q. B. 369.

[2] Lord Esher thought that Parke B. meant by 'immediately connected with the transfer itself,' something almost equivalent to 'in the transfer itself,' and he said that 'the way to construe it is that the negligence must be proximately connected with the transfer itself'; *Merchants, &c.*, v. *Bank of England*, 1887, 21 Q. B. D. 172.

[3] 7 C. B. N. S. 400.

[4] 7 H. & N. 603; 2 H. & C. 175.

[5] 2 H. & C. 181.

itself and be the proximate cause of the leading the party into that mistake; and also as I think, that it must be *the neglect of some duty* that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one[1], and not merely neglect of what would be prudent in respect to the party himself or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy.'

Rules. Summarized from the principal cases then[2] the rules may be stated as follows:—

1. There 'must be the neglect of some duty that is owing to the person led into that belief.'

2. 'The neglect must be in the transaction itself.'

3. 'Or the result must come about in, or in immediate connexion with, the negligent act, or omission.'

4. 'The omission must be the proximate cause of the leading of the person into the mistake.'

Let us now look at the criticisms of these rules by the principal text writers:—

Mr. Bigelow's Criticism. Referring to these rules Mr. Bigelow says[3]:—

'It is clear however that cases of estoppel arising out of negligence without a representation must be uncommon. They cannot fall within the propositions of Mr. Justice Brett[4] . . . for the proposition itself shows that a representation (by conduct) has been made.'

Mr. Bigelow seems to be in search of some instance 'of estoppel arising out of negligence *without a representation*'; and he appears to assume that the rules were formulated for cases of that sort[5]. This is the more remarkable because he observes that the cases in which the rules were formulated 'cannot fall within the proposition of Mr. Justice Brett . . . for the proposition itself shows that *a representation* (by conduct) *has been made*.' Inasmuch then as the cases themselves involved a representation, it would be extremely improbable that the rules framed by them should have been intended for cases in which there was no representation; more particularly when, as is asserted, it is extremely difficult to find such a case.

[1] The learned judge illustrates this point by reference to the case of the maker of a blank note, which he intends to be filled up 'and delivered to a series of holders.'

[2] *Bank of Ireland* v. *Evans*, 1855, 5 H. L. C. 931; *Exparte Swan*, 1859, 7 C. B. N. S. 400; *Swan* v. *N. B. A. Co.*, 1862, 7 H. & N. 603; 31 L. J. Ex. 425; 2 H. & C. 175; 32 L. J. Ex. 273; *Carr* v. *London*, 1875, L. R. 10 C. P. 307; 44 L. J. C. P. 109; *Scholfield* v. *Londesborough*, 1894, 2 Q. B. 660; 1895, 1 Q. B. 536; 1896, A. C. 514; 63 L. J. Q. B. 649; 64 ib. 293; 65 ib. 593.

[3] On Estoppel, 5th ed., pp. 653. 654.

[4] In *Carr* v. *London*, supra.

[5] See the whole context at pp. 653. 654.

The solution of Mr. Bigelow's difficulty lies in the difference between personal and assisted misrepresentation, without regard to which it may be said with equal truth that there may, or may not be estoppel by carelessness without misrepresentation. We may say first that there can be no estoppel of any kind unless there has been some misrepresentation—that is unless the estoppel-asserter has by somebody been deceived. Some fact must be misrepresented before there can be estoppel against the assertion of that fact. But we may also say that there *may* be estoppel by carelessness without misrepresentation—*by the estoppel-denier.* In other words there may be estoppel by carelessness where the misrepresentation is that of a third person, that is in cases of assisted misrepresentation.

Not being able to find a case of 'Estoppel by Negligence,' Mr. Bigelow imagines one[1]:—

'Let it be supposed that a man has been fixed with constructive notice, which, by reason of his negligence has not become knowledge to him, of the existence of some right in his favour; that this right is, to his knowledge, about being disposed of by another as that other's property; and that it is so disposed of to a purchaser for value, without notice of the right, and in the absence of the negligent party. Here would be a case of negligence which could hardly be treated upon the footing of a representation; but would not an estoppel arise, supposing all the other elements of it present?'

But the case is clearly one of misrepresentation—misrepresentation by a third party. The vendor is posing as owner of property in which the estoppel-denier has some interest; that is to say the vendor is representing that he is the absolute owner, whereas he is not. And the question is, Whether the bystander is, or is not, estopped by the assistance rendered to that misrepresentation by his silence? The very foundation of the complaint is that the purchaser was misled.

Moreover it is far from clear that the case is one of estoppel at all. Strengthening the case for estoppel, let us assume that the bystander's conduct is to be taken as an actual representation by him (in addition to the misrepresentation of the vendor), the question will then be, What was the representation that he made? Was it a representation that he had no right; or merely that he did not, at the moment, know of any? If the latter, then all he would be estopped from asserting would be that at that time he did know of his right. If he had in words asserted that he did not *at that time* know of any rights he would not have been estopped from asserting

[1] 5th ed., p. 654.

that he had subsequently discovered them. His conduct cannot be taken to mean more than that[1].

Mr. Cababé's Criticism. Mr. Cababé's criticism of the rules[2] follows that of Mr. Bigelow, but improves upon it:—

'It appears to have been hardly sufficiently noted that the conditions to be complied with before conduct can be made the foundation of the estoppel, by reason of its being negligent, are of such a character as to well-nigh eliminate "estoppel by negligence" as a separate head; or in other words that negligent conduct is only allowed to give rise to an estoppel in cases in which the conduct would give rise to the estoppel, even though it were not negligent. Yet this is clearly the case if it be true that for conduct to be the proximate cause of leading a party to believe in the existence of a state of facts, such conduct must amount to a representation of those facts. It may be going too far to say that, in the nature of things, there can be no such cases; if so it will suffice to say that negligence can only have any specific efficacy in giving rise to an estoppel, in those rare cases in which it proximately causes another to believe in the existence of facts, although it (the negligence) does not amount to a representation of those facts.'

Mr. Cababé describes the situation necessary for estoppel by carelessness with very considerable accuracy in his last sentence, and considering that he had no concrete case in view the language is singularly fortunate. Observe how completely it fits the case of assisted misrepresentation (already suggested), in which the mortgagee allowed the mortgagor to have the deeds with the aid of which he posed as unencumbered owner of the property. Here the delivery of the deeds 'proximately causes another to believe in the existence of facts (namely, unencumbered ownership), although it (handing over the deeds) does not amount to a representation of these facts.' Such cases are by no means rare. They are legion.

But Mr. Cababé's language is somewhat too inclusive as another of his sentences suggests. For there are many cases within his description (wide enough for all cases of assisted misrepresentation) which could not be said to be cases of estoppel by carelessness; because in them the conduct would have given rise to estoppel, 'even though it were not negligent'—cases therefore in which the presence or absence of negligence is altogether immaterial; cases within the general rule which 'regards the act done, and is entirely indifferent to the motive or reason for it, or the carelessness or diligence that may be in it[3].' Estoppel by carelessness

[1] *Wilmott* v. *Barber*, 1880, 15 Ch. D. 96; 49 L. J. Ch. 792; *Low* v. *Bouverie*, '91, 3 Ch. 82; 60 L. J. Ch. 594.

[2] On Estoppel, pp. 100. 101. And see p. 97.

[3] Ante, p. 387.

is not coextensive with estoppel by assisted misrepresentation, although included in it.

We are now prepared for an examination of the rules.

Rule No. 1.

'*There must be the neglect of some duty that is owing to the person misled.*'

This rule is undoubtedly valid, but it cannot be limited to any class of cases—to cases of personal, or assisted, misrepresentation, or to cases of estoppel by carelessness. For it is impossible that there can be estoppel of any kind, unless there be a breach of some duty to the person misled. To say otherwise, would be to affirm that the penalty of estoppel should be inflicted upon a person who had acted quite properly. The rule itself is indisputable; but it is not one applicable to estoppel by carelessness only.

Rule No. 2.

'*The neglect must be in the transaction itself*[1].'

It is in cases of assisted misrepresentation alone, as we have seen[2], that we are to look for instances of estoppel by carelessness; and yet it is not too much to say that it is impossible to find a case of assisted misrepresentation in which the carelessness can, with any accuracy, be said to be 'in the transaction itself[3].'

There are indeed at least three classes of cases (already referred to) in which carelessness is a ground of estoppel, but in them, as if to despite the rule, the carelessness is not and cannot be 'in the transaction itself':—(1) A man, owing to his carelessness, is tricked into executing some document, or (2) a mortgagee without reasonable excuse hands over to the mortgagor the title-deeds; afterwards the document or the deeds are fraudulently passed on to an innocent purchaser; and the signer of the document or the mortgagee is estopped. Now 'the transaction itself' took place between the knave and the purchaser, while the carelessness was prior to that, namely, in the execution of the document, or the delivery over of the deeds by the estoppel-denier.

And the same remark is true of all cases of assisted misrepre-

[1] This rule having been so frequently approved it requires the courage of strong conviction to criticize it. See *Agricultural* v. *Federal*, 1881, 6 Ont. Ap. 200.

[2] Ante, p. 387. For cases of personal misrepresentation the rule which most nearly approaches the one in hand is that the estoppel-denier must have had reasonable ground for supposing that the representation would be acted upon.

[3] This statement would justify Mr. Cababé's remark 'that the conditions to be complied with before conduct can be made the foundation of the estoppel, by reason of its being negligent, are of such a character as to well-nigh eliminate "Estoppel by Negligence" as a separate head'; but not for the reason which he gives (see ante, p. 395).

sentation (the only class in which there ever is estoppel by carelessness); for in them it is always impossible that the carelessness can be in the transaction itself. Observe that in that class of cases the estoppel-denier (the person charged with the carelessness) is never even a party to 'the transaction itself.' He is estopped because he has afforded opportunity or occasion for the transaction, which is brought about by the misrepresentation of some other person—estopped because he has done that which was necessary to make the misrepresentation credible; not because he has made the misrepresentation himself, or indeed knew anything about it.

The carelessness may possibly be subsequent to the transaction, even as it may be prior to it, although it cannot be in it. For example, were a forged note discounted by a banker, and were the person whose name was forged carelessly to remain quiescent, not advising the banker of the forgery until after the banker's position had been changed, he would be estopped[1]. In such cases it is, of course, impossible to say that the carelessness was in the transaction itself.

Conclusions. We have thus reached the following conclusions: that there are no cases of estoppel by carelessness under the heading personal misrepresentation (in that department the question is not the state of mind of the estoppel-denier, but whether he had reasonable ground for supposing that his representation would be acted upon); that among cases of assisted misrepresentation there are instances of estoppel by carelessness; that in none of them, however, is the carelessness in the transaction itself; nor is it possible for it to be so; it always either precedes the transaction, or is subsequent to it. The only alternative to this assertion is to say that, in the instances just given, the carelessness *was* 'in the transaction itself.' But to so say is to affirm that which our leading cases[2] deny; for in them (parallel cases of assisted misrepresentation) the alleged carelessness was said not to be 'in the transaction itself,' and for that reason it was held that there was no estoppel[3].

[1] *McKenzie* v. *British Linen Co.*, 1881, 6 App. Cas. 82; *Cairncross* v. *Lorimer*, 3 Macq. 827, 830; *Merchants' Bank* v. *Lucas*, 1887, 13 Ont. 520; 15 Ont. Ap. 573; 18 S. C. Can. 705. Distinguish between ratification and estoppel in such cases; *Scott* v. *Bank of N. B.*, 1894, 23 S. C. Can. 287; *Forsyth* v. *Day*, 1858, 46 Me. 196.

[2] Ante, p. 392.

[3] There is a certain ambiguity in the phrase 'in the transaction itself' which in *Coventry* v. *Great Eastern Railway* (1883, 11 Q. B. D. 776; 52 L. J. Q. B. 694) was made use of to overcome the application of the rule. A railway company (through carelessness) issued two delivery orders for the same goods and the plaintiffs advanced money upon the faith of the second of them to its holder. Brett M.R. said:—'Then was the negligence of the defendant the "proximate" cause of the loss sustained by the plaintiffs? I use the expression "proximate cause" as meaning the "direct and immediate cause." Here the production of the document was the direct and immediate cause of the advance of the money.' And the learned judge held the

Let us look again at these cases, and see what, with their help, we can make of the rule in hand.

In the *Bank of Ireland* v. *Evans* case[1], the secretary of the company fraudulently affixed its seal to a transfer of shares, and sold them to an innocent purchaser. The company was not estopped because its carelessness in trusting the secretary with the seal was 'not in the transfer itself.' Very well. Now recall the mortgage case, in which a mortgagee, who allowed the mortgagor to have possession of the title-deeds, was estopped as against an innocent depositee—was estopped although his carelessness in trusting the mortgagor with the deeds was not 'in the transaction itself, but prior to it.'

In the one case the company entrusts its seal to its secretary; the secretary makes fraudulent use of it; and the company is not estopped. In the other a mortgagee entrusts his title-deeds to his mortgagor; the mortgagor makes fraudulent use of them; and the mortgagee is estopped. It seems to be sufficiently clear that any distinction between these cases is not to be found in the fact that in one of them the carelessness was in the transaction itself, and in the other that it was not; and that the point of difference (if there be any) must arise from a comparison of the conduct of the estoppel-deniers—by the conclusion that the company in entrusting its seal to its secretary was not guilty of carelessness at all (for the seal must be entrusted to somebody); but that a mortgagee cannot quite so easily justify his unnecessary and unusual confidence in his mortgagor. In other words, that there is not in the one case, but there is in the other, something done 'which a prudent and reasonable man would not do'—that is, some carelessness.

Turning now to Swan's case, note that he was not estopped for the reason that his carelessness in executing the blank transfers, and giving them to the broker, was not negligence 'in the transaction' between the broker and the innocent purchaser. Vary the case a very little. Suppose that Swan, when giving to the broker the blank transfers, with instructions to sell the *A* Company shares, had also given him, not only the *A* Company certificates, but also (as custodian merely) the *B* Company certificates. There is very little doubt that Swan would now be estopped, for he has

case to be within the rule—that the negligence was in the transaction itself. But distinction is here overlooked, between the negligence in issuing the certificate which was the act of the company, and 'the production of the document,' which was the act of its holder. The learned judge says, that 'the *production* of the document' was the direct and immediate cause, &c. Granted. Then the negligence was not. The negligence was not 'in the transaction itself,' but in a document executed prior to the transaction, which another person made fraudulent use of, and yet the company was estopped. The same reasoning applied to the Swan case would vary its result.

[1] Ante, p. 392.

perfectly equipped his broker for fraud[1]. But his negligence can no more be said to be 'in the transaction itself' now than it was before. In this case also, then, it cannot be said that the absence of estoppel was due to the carelessness not being 'in the transaction itself.' The question again would be one of reasonable care —reasonable to hand over blank transfers if you retain the certificates, but unreasonable to hand over both. The question of in, or out of, the transaction, seems to be quite irrelevant.

The present writer by no means agrees that there was no carelessness in the *Bank of Ireland* v. *Evans* case. Upon the contrary, he adopts the language of Day J. in a subsequent case[2].

'The grossest negligence seems to have accompanied this confidence, because, notwithstanding all the warnings which most men experienced in the affairs of the world have had, that no man is to be trusted without the exercise of reasonable care by those who have to look after the affairs of other people, it seems to have been thought that the common seal and the affairs of the company might be entrusted to their clerk without any check or superintendence of any sort or kind being exercised over him by the corporators or any of the officials of the company. One can scarcely imagine a case of grosser negligence than the negligence of all connected with the affairs of this company in their dealings with their clerk. It is not for me to suggest that every clerk, or any clerk, is to be suspected of evil doing, but it is idle to talk of the absence of necessity for exercising due and reasonable care over the officers of any corporate or other body. A person who was looking after his own affairs would take very good care to see that his seal, if it had any value, was looked after; but here a corporate body, who can only speak and act by its common seal, are content, one and all, to entrust the common seal to an officer over whom they exercise not the slightest superintendence.'

If this criticism be just, and if for estoppel it be not necessary that carelessness should be in the transaction itself, then the *Bank of Ireland* v. *Evans* case should have been otherwise decided.

Swan in his cases seems to have been freed from the charge of carelessness because of his retention of the certificates, without which it was thought the blank transfers would be useless. With that reasoning no fault can be found.

Result and its Explanation. Our reasoning has produced the extraordinary result that a rule so well established, defined, and explained as the one in hand is not only impossible of application,

[1] The judgments largely turn upon the fact that the broker had to steal the certificates in order to perpetrate the fraud; and that therefore, Swan had a string to his blank transfers. And see *Colonial Bank* v. *Cady*, 1890, 15 A. C. 297; 60 L. J. Ch. 131; *Marshall* v. *National*, 1892, 61 L. J. Ch. 465; *Pennsylvania Railway Company's Appeal*, 1878, 86 Pa. St. 80.

[2] *Mayor, &c.* v. *Bank of England*, 1887, 21 Q. B. D. 162; 57 L. J. Q. B. 418.

but quite erroneous. An investigation of its origin will unravel the mystery, and reveal the fact that inattention to a somewhat palpable distinction was responsible for the confusion.

Young v. *Grote*[1], 'that fount of bad law[2],' was at the bottom of the trouble. A drawer of a cheque left spaces in it, which were fraudulently made use of to raise the amount of it, and it was held that the drawer, because of his carelessness, and not the banker, must lose. The carelessness was *in the drawing of the cheque* —in the document itself.

Then came *Bank of Ireland* v. *Evans*[3], in which the secretary of the company fraudulently applied its seal to certain transfers of shares. The company was not estopped because (per Parke B.)

'the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid, must be negligence in, or immediately connected with the *transfer* itself. Such was the case of *Young* v. *Grote*.'

Note that the learned Baron does not say 'in the transaction itself,' but in 'the transfer itself,' that is, in the document of transfer. In other words, the negligence must not be merely in leaving a seal in the hands of a secretary—that is too remote—but in the transfer itself. He distinguishes between *Young* v. *Grote*, in which the neglect was in the *cheque* itself, and the case in hand, in which it was not 'in the *transfer* itself,' but in leaving the seal with the secretary.

Shortly afterwards came *Swan* v. *N. B. A.*[4], in which the broker used the executed but blank transfers to assign shares which he had no authority to deal with. Here now was a case in which, if there was any negligence at all, it was 'in the transfer itself,' that is, in leaving blanks in the transfer. The Court held however that there was no estoppel notwithstanding the blanks; that is, notwithstanding that the neglect was 'in the transfer itself.' The previous rule, therefore, had to be changed, and it was said 'that the neglect must be in the *transaction* itself[5].'

But so to say was entirely to alter the rule, and to create one that would apply to cases to which Baron Parke had no idea of extending it. It is clearly one thing to say that where a fraud has by some knave been perpetrated by the help of some document, the ostensible signer of the document is not estopped unless

[1] 1827, 4 Bing. 253; 12 Moore 484; 5 L. J. C. P. 165.
[2] So Esher M.R. in *Scholfield* v. *Londesborough*, '95, 1 Q. B. 536.
[3] 1855, 5 H. L. C. 389.
[4] 1859, 7 C. B. N. S. 400; 30 L. J. C. P. 113; 1862, 7 H. & N. 603; 31 L. J. Ex. 425; 1863, 2 H. & C. 175; 32 L. J. Ex. 273.
[5] It was made still more definite, afterwards, in *Carr* v. *London* (1875, L. R. 10 C. P. 307; 44 L. J. C. P. 109), in which it is said that the negligence must be 'in the transaction itself, *which is in dispute*.'

he has been careless with regard to *it* (which was the ground of distinction between *Young* v. *Grote* and *Bank of Ireland* v. *Evans*); and quite another thing to say that for estoppel by carelessness the neglect must be in the transaction between the knave and the innocent purchaser. It is completely to change the period and place at which the carelessness is required to appear, and to transfer it from the document and its execution (if there be a document in the case) to some fraudulent transaction in which it was subsequently used by some other person.

The change was unconsciously made. The ambiguity of the word 'transfer' was not observed. Baron Parke intended by it the *document of transfer*, but he has been taken to have used it in the sense of the *transaction* by which the *transfer* of the shares had been accomplished[1].

Observe the effect of the amendment of the rule upon some of the cases of estoppel by carelessness. We have seen that a man who, through his own negligence, is tricked into signing a document, may be estopped by it as against an innocent purchaser. This is quite in harmony with Baron Parke's rule—the negligence is in the document itself. But according to the amendment there could be no estoppel because the negligence was not 'in the transaction itself,' that is, in the subsequent transaction between the knave and the innocent purchaser.

The effect is still more marked in the mortgage case. To it Baron Parke's rule has no application whatever, for it is not a case in which there is a document with which to connect negligence. And again, the amendment would reverse well-settled decisions; for the mortgagee's carelessness in handing over the deeds to the mortgagor cannot possibly be said to be in the subsequent transaction, in which the mortgagor pledges the deeds to an innocent depositee.

Analogy from law of Torts. If the point that the rule in hand cannot apply to cases of estoppel by assisted misrepresentation has not been made sufficiently clear, a reference by way of analogy to the law of torts will supply the defect. Suppose that in carelessly handling some explosive I discharge it, and wound a neighbour; I am liable; the carelessness was in the transaction itself; and the case is one in which I have personally inflicted the injury. Suppose, again, that I had so carelessly packed and labelled an explosive that a carrier in handling it with accustomed care dis-

[1] See how the phrase 'in the transaction itself' is held down to the final act and is denied to extend to the negligence which prepared the way for that act, and made it possible: *Saderquist* v. *Federal Bank*, 1889, 15 Ont. Ap. 615; *Agricultural* v. *Federal*, 1881, 5 Ont. Ap. 200.

charged it and injured some people; I should again be liable[1], although I did not personally inflict the injury, and although the carelessness was not in the transaction itself. The negligence was in the previous packing and labelling (as in the Swan case it was in the previously prepared document); it was not in the explosion, although the explosion was reasonably consequent upon the carelessness (just as in the Swan case it was not in the broker's transaction, although that, in order to estop, would have to be reasonably consequent upon leaving blanks in the transfer).

That negligence must be in the transaction itself will not answer as a rule in torts, nor will it in estoppel, which in many of its aspects is very closely allied to tort.

Rule No. 3.

'*The neglect must be the proximate cause of the leading of the person into the mistake.*'

We have arrived at the conclusions (1) that it is among cases of assisted misrepresentation only that we can find instances of estoppel by carelessness, and (2) that in such cases it is impossible that the carelessness can be 'in the transaction itself.' And we are now to see that the present rule is also an impossible one, for 'the neglect' in cases of assisted misrepresentation never can 'be the proximate cause of the leading of the person into the mistake.' There is always interposed the misrepresentation of some third person. In fact the word 'proximate' has been felt to be altogether inappropriate, and proposal has been made to change it. Said Lord Esher[2]:—

'I think I should prefer to insert in the proposition the word "real" instead of the word "proximate."'

And Lopes L.J. agreed with him. But Fry L.J. said[3]:—

'I do not feel sure that the term "real" is any more free from difficulty than the term "proximate."'

With this last the present writer agrees. Neither word is applicable for the reason already given. 'Proximate,' the carelessness and the result can never be (in the line of cases in hand)[4]. And there is no single 'real' cause, but always two causes. In

[1] *Farrant* v. *Barnes*, 1862, 11 C. B. N. S. 553; 31 L. J. C. P. 137.
[2] *Seton* v. *Lafone*, 1887, 19 Q. B. D. 71; 56 L. J. Q. B. 415.
[3] Ib. p. 74.
[4] The writer is not unmindful of a criticism of Lopes J. in *Scholfield* v. *Londesborough* ('95, 1 Q. B. 552):—'It might as well be said that . . . when a sack fell from a house and injured a passenger in the street, through the negligence of the defendant's servants, that the sack was the proximate cause of the injury, and not the negligence.' In the cases referred to in the text there is an intervening and independent act, of a new actor.

the mortgage case the innocent purchaser was deceived by (1) the misrepresentation of the mortgagor that he was the unencumbered owner; and (2) by the mortgagee's assistance in handing over the deeds. In Swan's case (as amended for purposes of illustration) the innocent purchaser was deceived by (1) the misrepresentation of the broker, and (2) the assistance of Swan, who executed the blank transfers, and handed over the certificates. In both of these, and in all other such cases, there are two efficient or real causes, and the negligence is not the proximate one.

If the word 'proximate' is to be retained at all, it must be in some such sentence as that of Keating J. in the Swan case[1]. We must not say, as above, that

'the neglect must be the proximate cause of the leading of the person into the mistake';

but with Keating J.:

'The negligence directly and proximately enabled the broker to effect the transfers';

although the sentence is not a fascinating one.

But for the fact that it is difficult to think in such cases as those in hand of two proximate causes[2], there would be less objection to the following:—

'Where two efficient proximate causes contribute to an injury, one who, by his own negligent act brought about one of such causes, is liable for the injurious consequences resulting therefrom[3].'

Upon the whole the present writer suggests that the word 'proximate' should be discarded, and offers as a substitute for the rule under consideration, the requisite that

'The estoppel-asserter's change of position must have been reasonably consequent upon the carelessness.'

Observe the distinctions between the two rules—the one under discussion, and that suggested. Orthodoxy requires that the neglect should be the proximate cause of the mistake; but such close association is, as we have seen, impossible. Innovation demands merely that one thing should have been reasonably consequent upon the other. Another alteration is perhaps more verbal, although not without substantiality. It suggests that it is the change of position, and not merely the change of thought (some mistake) that has to be reasonably consequent upon the carelessness.

[1] *Swan* v. *N. B. A.*, 1863, 2 H. & C. 175; 32 L. J. Ex. 273.

[2] Cold and humidity may be two proximate causes of rain; but it is not quite so clear that in Swan's case it would be correct to say that the broker's fraud and Swan's negligence were both proximate causes of the injury done to the purchaser.

[3] *Waller* v. *Missouri, &c. Ry. Co.*, 59 Mo. App. 410; 1 Mo. App. R. 56.

SUMMARY.

The result of the foregoing considerations seems to be that—

(1) There can be no estoppel without misrepresentation; there can be no such thing as estoppel by carelessness, unless some one has been deceived.

(2) It is not, however, at all necessary that the person said to be estopped by the carelessness should have himself made the representation, or should have been in any way a party to it.

(3) Upon the contrary estoppel by carelessness never arises where the misrepresentation is chargeable to the careless party. That would be a case of personal misrepresentation; and in such cases estoppel would ensue whether there was carelessness or not.

(4) It only arises where the carelessness is by one person and the misrepresentation by another, that is, in cases of assisted misrepresentation.

(5) *Rule No.* 1, 'That there must be neglect of some duty that is owing to the person misled,' is of general application, and is not confined to cases of estoppel by carelessness.

(6) *Rule No.* 2, 'That the neglect must be in the transaction itself' is not a rule possible in estoppel by carelessness—the neglect is necessarily always either prior or subsequent to 'the transaction itself.'

(7) *Rule No.* 3, that 'the neglect must be the proximate cause of the leading of the person into the mistake' is impossible of application in cases of estoppel by carelessness. The proper rule is that 'the estoppel-asserter's change of position must have been reasonably consequent upon the carelessness.'

(8) Cases of estoppel by carelessness are not at present uncommon. They should be determined upon the ground well known in actions of tort, that people ought to be punished for

'The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do'—

punished sometimes by damages, and sometimes by estoppel.

JOHN S. EWART.

WINNIPEG, MAN.,
CANADA.

ON SCOTTISH SERJEANTIES.

SERJEANTIES have been strangely misconceived in Scotland by ancients and moderns. Where Glanvill wrote in England that there was no fixed relief payable from baronies, adding *Idem est de serjanteriis*, the mysterious writer of the Regiam Majestatem in Scotland faithfully copied the observation concerning baronies but bungled over the supplement. *Idem de suggestoribus*, he said. This reading, which Sir John Skene rejected, now stands in the Record edition of the Acts of Parliament of Scotland (i. 621) meaningless though it be. Skene surely chose the better part, for sense, when in 1609 he printed *serjanteriis* and set *suggestoribus* in a footnote to his Latin volume, while in his Scots translation of the Regiam (ii. ch. 71) he rendered the passage thus: 'The like is to be understand of lands halden be serjantie.' Probably nevertheless our great legal record scholar Thomas Thomson was right in regarding an error so capital as too significant of an unauthoritative origin of the Regiam to admit of its being edited away.

Skene had already examined the subject in his charming 'Exposition of the termes and difficill wordes' published in 1597. His account of serjeanty in England bears quotation. '*Graude serjantye*,' he says, 'is quhen an man haldis his landes of the king for the quhilk he suld passe with him in his hoist, or to beare his banner with him in his warres, or to lead his hoist or armie. And hereto belangis warde mariage and relieve, quhilk is ane maist speciall knight's service. *Petit serjantye* is quhen ane haldis his landes of the king yeelding to him ane knife or buckler, ane scheife of arrowes, ane bowe, or other sik service conforme to his infeftment: quhairunto nawaies belangis warde mariage or relieve, quhilk we may call blenche-ferme or *alba firma*.'

So much for Skene's broad rather than exact information about English serjeanties: on those of his own country he ventures nothing. His contemporary, Sir Thomas Craig (i. 11 [12, 17]), speaks highly of them. Concerning grand serjeanty he says: 'Such services amongst us are many although the name is in disuse,' instancing the privilege to carry the royal banner in war, to bear the king's spear, to put on his armour in the day of battle, to lead or marshall the army, to carry the king's sword, or to act as butler or steward at the coronation. Cornage he numbers amongst the

grand serjeanties—the true Scot coming out in the incidental declaration that amongst tenants by cornage across the border, bound to blow the horn on the irruption of the Scots, the greatness of the peril heightened the dignity of the service to the rank of grand serjeanty if the tenure was from the king—*magnitudine, credo, periculi servitium extollente.* Petty serjeanty, on the other hand, consisted in the payment to the king yearly of bow, lance, quiver, or spurs, which prestations he says were frequent among his countrymen. He remembered a weighty controversy on the point whether ward relief and marriage were exigible from lands held of the king in petty serjeanty, when the court afraid of arrogating too much to itself remitted the whole question to parliament.

With these classic passages in mind it becomes difficult to understand the unequivocal pronouncement made by an ever instructive and interesting exponent of ancient Scottish history in general and of legal antiquity in particular. 'We had no tenures by serjeanty. The name is not known with us, at least not in the English sense.' Professor Cosmo Innes[1] must have had in view a narrower interpretation of the term than now prevails, for it is not doubtful that we once had tenures by serjeanty in the English sense; and they were probably not quite unknown by that name.

The earlier examples are scarce. In twelfth and thirteenth century tenures the knight is ubiquitous; the serjeant (with functions actually or historically somewhat menial) not so; yet we certainly find him already in that great period of developing feudalism, the reign of William the Lion. He appears in a Sutherland example[2] as an archer and connected with forinsec service, though that tenure is not frequent until considerably later, when the war of independence developed specialities. Under William's successors tenures emerge such as that of a Lanarkshire fief for the service to the king, of two archers, and besides of one sufficient serjeant with a horse to make all kinds of liverance necessary in the household to the servants and the dogs. Six persons were engaged in these duties, receiving no allowance from the king except their victuals. 'Moreover,' so runs an important clause in a verdict, 'if ward relief or marriage happen they ought to belong to the king[3].'

[1] Scottish Legal Antiquities, p. 62.

[2] Skelbo in Sutherland (1203–1214): 'faciendo pro predictis terris servicium unius sagittarii . . . et adquietando forinsecum servicium Domini Regis quantum ad predictas terras pertinet.' Registrum Moraviense (facsimile following preface).

[3] Pettinain, Lanarkshire: 'jurati dicunt quod dictus Adam et heredes sui tenentur facere domino Regi servicium duorum architenencium et insuper unius servientis sufficientis in equo ad faciendum liberacionem omnimodam que fieri deberet in hospicio garcionibus et canibus, de quo servitio serviebant tales . . . qui nichil acceperunt de domino Rege preterquam victum: Preterea si warda vel maritagium acciderent domino Regi debent pertinere.' Acts Parl. Scot. i. 98.

In 1261 the Sheriff of Elgin assisted by two thanes one bailie (*prepositus*) and nine other jurors sat in judgment on the claim of Robert the crossbowman (*balistarius*) to a garden at Elgin which Robert alleged right to hold in virtue of his wife Margaret by the service of finding vegetables for the king's kitchen during his residence in the castle of Elgin, and, it was stated, if the king happened to maintain gerfalcons there, Margaret's ancestors had received daily a penny and for the food of each gerfalcon two pennies with a chalder of oatmeal annually for the keep of the birds[1].

Elsewhere I have been endeavouring to establish[2] that the Motes or moated mounds of Scotland, the earthen bases of fortresses originally of wood, green hillocks normally artificial and persistently associated in later times with legal memories as moothills, are in very many cases to be assigned to Anglo-Norman settlers in the middle and close of the twelfth century. One of these mounds was the castle of Elgin where Margaret's ancestors served the king and his gerfalcons. Another verdict from the year 1262 records a grant of lands in that locality along with a house in the castle of Elgin, for the service of one serjeant and for doing Scottish military service[3].

Distinguished in its class was the castle mound of Montrose. Simon the janitor in 1261 having died, his five daughters sought the succession to his lands. Accordingly the barons of eighteen baronies and a great part of the good burgesses of Montrose found[4] that in the time of William the Lion a man named Crane had held Inianey; that he was succeeded by Alan and subsequent heirs: and that he and they never did any military service, nor gave aid, nor did any thing else in the world for said land except the office of keeping the gate of the king's castle of Montrose[5].

Such localising of the service in connexion with royal strongholds is not the rule; oftener the terms are general. In 1270 for instance, lands in Fife were returned as rendering the service of

[1] A garden at Elgin, A.D. 1261: 'inveniendo olera et aleam ad coquinam domini Regis dum in castro de Elgyn moram fecerit. Et si contingat dominum Regem aliquod ostorium vel gerfauc. ibidem perhendinare antecessores dicte Margarete pro pastu cujuslibet ostorii de die in diem reciperent denarium et pro pastu cujuslibet gerfauc. ii denarios et unam celdram farine avene annuatim pro custodia avium reciperent.' Acts Parl. Scot. i. 100.

[2] The Motes in Norman Scotland, in Scottish Review for October, 1898.

[3] Mefth, A.D. 1262: 'omnes jurati dicunt quod dominus Rex Willelmus dedit dictam terram de Mefth cum sua domo in castro de Elgyn . . . hereditarie per servicium unius servientis et faciendo exercitum Scoticanum.' Acts Parl. Scot. i. 101.

[4] Inianey, A.D. 1261: 'jurati dicunt . . . quod dicti Crane Swayn et Symon nunequam fecerunt exercitum nec dederunt auxilium nec aliquid aliud in mundo pro dicta terra fecerunt nisi officium Janue Castri domini Regis de Munros.' Acts Parl. Scot. i. 100.

[5] Similar tenures occur in connexion with many English castles, for instance Bamburgh, Testa de Nevill, 394.

one serjeant with a hauberk and as accountable for Scottish service for a davach and a half[1].

Our mere handful of examples is perhaps too slender a support for broad inferences, still one must needs observe how they make for at least four points: (1) that they, like knight-service, show a tendency to radiate from the royal county castles, (2) that they suggest some parallel with castle-guard[2] in their connexion with the keeping, and provisioning of the castles, (3) that King William's name and period recur, and (4) that the allusion to forinsec service and its assessment on that remote taxation-unit the davach or land of four ploughs, as well as the liability to the casualty of ward, go to ally serjeanties with the same period and conditions as knight-service. Of the law affecting these early tenures of feudalism very little has been made out. At the most we can gleam a few corroborations of the body of doctrine assembled so admirably for England in a recent work[3] to which the heartiest of all tributes, that of warmly appreciative study, is gratefully paid in the north. The stipulation for ward and marriage is of course important. A slight intimation in the Exchequer Rolls bears out another circumstance. In England we know that the king rigorously enforced the rule that his serjeants could not without his leave alienate their lands. So in Scotland in 1266 lands were resumed by the crown because of the alienation of serjeanty[4].

One feature of serjeanty in Scotland there is, to which I doubt the existence of systematic parallel in England. I refer to certain late creations more particularly in the time of Robert the Bruce. That feudalism had been found a successful and businesslike military system in Scotland, that the army was mustered by summons to military tenants, or that the service tendered was adequately checked must be gravely questionable. No record of such a thing exists, and the absence of rolls of the military tenures contrasted with the relative fullness observed in the record of money payments is easily accounted for, if not by the desuetude of the obligation at any rate by some negligence about its precise exaction, due no doubt partly to the non-effectiveness of the system in itself, coupled with the rarity of its being called into requisition in the thirteenth century. How then are we to explain the phenomena of the tenures in the charters of King Robert the Bruce?

[1] Balcormok, Fife, A.D. 1270: 'dicunt quod Balcormok reddit servicium unius servientis cum haubergello i m dicunt quod facit in servicio Scoticano pro una davata terre et dimidia davata.' Acts Parl. Scot. i. 102.

[2] See Knight Service in Scotland, Juridical Review, January, 1899.

[3] Pollock and Maitland's Hist. of Eng. Law.

[4] Balnamon, Forfarshire, A.D. 1266: 'quam dominus Rex saisire fecit per alienationem serjandie.' Exchequer Rolls, i. 26; cp. also i. 23.

Out of several collections of representative charters, choosing the cases where the reddendo was set forth, I have observed nineteen for knight-service and nineteen for service of archer or spearman. The proportion of serjeanties of archery (twenty-four archers in seventeen charters, as against twenty-two knights in the same number) will be seen to be large. So much the more interesting on that account becomes the query how many of them were old tenures, how many new? They fit the military situation so admirably. Falkirk battle had illustrated painfully for the Scots the utility of bowmen, and Bruce knew it well. Barbour tells once of his salute to the advancing enemy, when he seized

> 'A bow and a braid arrow als,
> And hyt the formost in the hals.' (The Bruce, vii. 582.)

Bannockburn showed him sharply alive to the tremendous power of archery. That he should have a preference for archery tenures might thus not seem surprising, and it accords with the indications. While no doubt many such tenures appearing in his charters may have been traditional, it is to be suspected that often a new grant after a forfeiture would be on an altered model. 'On fut suld be all Scottis weire,' the words of the so-called 'King Robert's testament' certainly expressed his military, perhaps also his feudal, policy. A very singular example occurs in connexion with Whitsome in Berwickshire. King John Balliol had in 1293 made a grant of it to John del Yle for the service, probably traditional, of half a knight[1]. King Robert during the war turned Balliol's grantee out and halved the property between two adherents of his own for the service of half an archer each[2]. There is a little chain of proof that in service at this time one knight was reckoned the equivalent of two archers[3], so that Bruce's change was neither increase nor decrease of the feudal burden. After Bruce's death when Edward Balliol gained possession of Berwickshire for a time he renewed the rights of the heir of John del Yle 'to be held as his father the foresaid John formerly held it[4],' thus evidently restoring the knightly tenure.

Amongst the military serjeanties constituted by Bruce was one with an unusually interesting relation to a great episode of border history. In 1323 Sir Andrew of Harcla, Earl of Carlisle, was executed for high treason. The ins and outs of the affair have not

[1] Rotuli Scotiae, i. 22.
[2] Registrum Magni Sigilli, i. 8.
[3] Reg. Mag. Sig. i. 4 shows £20 land two archers; Ib. i. 4, £5 land half an archer; Ib. i. 12, £10 rent one archer; Rotuli Scotiae, i. 22, £10 land half a knight equated (Reg. Mag. Sig. i. 4) with two half archers.
[4] Rotuli Scotiae, i. 269: 'tenend. prout predictus Johannes pater suus illum prius tenuit.'

been exhaustively ascertained: the city of Carlisle, if we may judge from a sympathetic local chronicle [1], was not altogether persuaded that the gallant earl was a traitor. Disgusted with the weakness of Edward II he had, without royal cognisance, taken it upon him to conclude a treaty with Bruce whom he met in conference at Lochmahen. This coming to the ears of the court led to the issue of secret instructions and the capture of the earl in his own castle, speedily followed by sentence of death, drawing, hanging, and quartering. Now it happens that a hitherto unprinted charter of Bruce to Sir William Blount, dated May 2, 1325, granting the royal demesne lands of Aberlemno in Forfarshire, narrates that it was given in respect of the renunciation 'of certain conventions made by us with the late Andrew de Harcla earl of Carlisle.' Blount, though a Scotsman, had been one of the household of the earl and 'special,' as a contemporary [2] has it, with him. He went off into Scotland immediately after the earl's apprehension for treason. The nature of Bruce's undertaking towards him entered into with the earl can only be dimly surmised. His tenure of Aberlemno, undoubtedly a new creation, was 'for the service of two archers in our army [3].'

The words of commonest form for analogous serjeanties are 'for the service of one archer' (*architenentis*). On occasion the warrior enters the register as a mounted bowman [4]. Once the valuable addition occurs, though in a curious and doubtful Scottish translation, 'for the service of ane archtennent in the common ware of Scotland for six months [5].' Not six months, but six weeks or forty days constituted the norm of feudal service. The archer, like the knight, admitted of being split into vulgar fractions—the half-archer occurring frequently.

Serjeanties there were other than those of archery such as for the service of a serjeant with a hauberk on horseback, an armoured foot-soldier or a foot-soldier with sword and lance and forty days' rations [6]. There was nevertheless no such profuse variety as exists

[1] Lanercost Chronicle, p. 221.

[2] Ib. p. 250.

[3] Transcript in the Earl of Haddington's Transcripts: 'Robertus etc., Sciatis nos pro renunciatione cujuscunque juris seu clamei super quo Gulielmus Blount miles aliquibus temporibus presentibus vel futuris erga nos et heredes nostros quoquomodo movere posset questionem vel demandam ratione quarumcunque conventionem cum quondam Andrea *de Harda* [words in italics are added on margin but continue a line] comite Carlioli per nos statutarum dedisse . . . ffaciendo inde nobis et heredibus nostris dictus Willelmus et heredes sui servitium duorum architenentium in exercitu nostro.' Haddington MS. (Advocate's Library, 34. 2. 1[a]), p. 67[b].

[4] The Melvilles, ii. p. 2, charter 1165–70 of Grendun by William the Lion: 'per servicium unius arcarii cum equo in exercitu.'

[5] Duke of Hamilton's MSS. (Hist. MSS. Com.), p. 210.

[6] Haddington MS. p. 68[b]: 'unius servientis cum hauburgello in equo et faciendo forinsecum servicium quod pertinet'; p. 41[b]: 'unum peditem armatum cum sustentatione sua quadraginta dierum'; p. 42[b] (two charters): 'unum peditem cum gladio et lancea et sustentatione sua quadraginta dierum.'

in the rolls of tenures in England. Among the most dignified was that of acting as standard-bearer. More than one type of this emerges in the course of the national history. In 1178 William the Lion founded the monastery of Arbroath in honour of the murdered and canonized Archbishop Becket. Among the endowments bestowed on the new institution by the founder was a grant made between 1204 and 1211 of the keepership of a famous relic, the Brechbennach or sacred banner of St. Columba. Coupled with that consecrated and valuable trust was a gift of the lands of Forglen in Banffshire 'for doing therefrom the service which is due to me from that land, in the army, with the foresaid Brechbennach [1].' Thus in the abbots of Arbroath as representative of that eminently militant 'athlete of God' St. Thomas of Canterbury, there was vested the function—exerciseable no doubt by deputy in the actual engagement—of bearing in the royal service during war the banner of a saint upon whom the 'men of Alban' for centuries anterior had placed a chief reliance. 'They would have as their standard,' say the Irish annals [2], 'at the head of every battle the crozier of Columcille.' Accordingly it need not surprise us to find in what may be called the Song of Bannockburn a contemporary poet, himself Abbot of Arbroath, and as such Columba's standard-bearer by serjeanty, accrediting Bruce with a speech to his troops, assuring them that St. Thomas and the Saints of Scotland would be comrades with them and guarantors of victory in the battle that day [3]. It is a piquant enough instance of a Scottish serjeanty after a spiritual sort in a connexion equally patriotic and literary.

At the close of the thirteenth century the office of royal standard-bearer attained a place of dignity such that chronicle records the holder's name [4], and documents making it hereditary in the Scrymgeour family add interest to the archives of the war of independence. In 1298, Sir William Wallace [5], as Regent of Scotland, granted the constableship of Dundee to Alexander called Skirmischur for, amongst other things, his faithful service in carrying the royal banner, but the charter does not in terms constitute a serjeanty of standard bearing. This was done by King Robert

[1] 'Faciendo inde servicium quod michi in exercitu debetur de terra illa cum predicto Brechbennach.' Reg. Aberbrothok, 10.

[2] Irish Annals, fragments, year 909. Haddan and Stubbs, Councils, ii. 145.

[3] Bower's Scotichronicon (ed. Goodall), ii. 249. See also 'The real Scots Wha Hae' in Scottish Antiquary, vol. xiv. (July, 1899), where this remarkable poem is discussed.

[4] In opposition to the Scrymgeour tradition of ancient grant it is noticeable that the *Flores Historiarum* state that in 1296 at the battle of Dunbar the Scottish standard was carried by a Sinclair.

[5] Acts Parl. Scot. i. 453. Compare this charter with the Scrymgeour legend in Bower's Scotichronicon i. 285, and as to other sources see Notes and Queries, 8th series, x. 377–8.

the Bruce in 1324 in a charter to Nicholas Skirmeschour (the successor of Alexander who for his adherence to the national cause had been hanged by Edward I in 1306) which bound him and his heirs to find 'two sufficient men at arms to carry our banners in our army[1].'

Not less attractive are some of the non-military tenures of the nature of serjeanty. Certain very bleak lands on the border of Carrick and Galloway, as well as property in Forfarshire, were held by the service of finding a fit surgeon for King Robert and his successors[2]. A hereditary medical adviser seems odd enough, but the arrangement lasted for more than one generation. Patrick M^c^Beth, the original grantee, first of the line, had a son Hector, the 'Hector Leche' of various references[3] in the state papers, showing him to have been a trusty attendant of David II at and after the time of his English captivity. Hector died in or before 1369, and his brother Gilbert reigned as *Medicus* in his stead[4].

Sport, so strongly represented in the petty serjeanties or blench holdings for hawks, hounds, hawking gloves, and the like, occasionally influenced what may be called official serjeanties. Thus in 1327 the whole forest of Craigie, Kincardineshire, outside the pale of the enclosure was in recompense for the making of a park in the forest, conferred upon Sir Alexander Fraser and John his son for the maintenance of the pale (*clausura*) and for watching the same[5]. Another charter of the same year is still more in point. Fullerton is a place in Forfarshire, and its name is very adequately explained by the tenure of Geoffrey of 'Foulertoun,' being for service in the office of fowler when the king resided in the county. Geoffrey and his heirs were to keep all the geese and fowls they captured during the royal absence from the county, the king providing for the food of these birds as well as for the liverance of a servant, a boy, and two horses[6].

[1] Charter of lands of Hillesfield and South Bordland of Inverkeithing: 'Inveniendo . . . duos homines sufficientes armatos ad vexilla nostra portanda in exercitu nostro quibus nos et heredes nostri invenimus equos ad arma.' Haddington MS. p. 70^b^. Another Scrymgeour held lands and office hereditarily as a serjeant of arms. Reg. Mag. Sig. ii. 1582, year 1484.

[2] Ballogillauchie, Forfarshire and Lachtalpen, Wigtownshire, charter dated 1324: 'Inveniendo nobis et heredibus nostris predictus Patricius et heredes sui unum sufficientem medicum surgerie pro omni alio servicio.' Haddington MS. p. 64^b^.

[3] Rotuli Scotiae, i. 724, 729, 731, 751, 755, 797, 799; Exchequer Rolls, i. 562, 566, 617; ii. 6.

[4] Reg. Mag. Sig. i. 70.

[5] 'Sustinend. dictus Alexander et Joannes filius suus clausuram dicti parci et ipsam custodiam ad opus nostrum.' Haddington MS. p. 63^b^. Sir Alexander Fraser is frequently mentioned in Barbour's Bruce.

[6] 'Serviendo nobis et heredibus nostris infra vicecomitatum de fforfar de officio aucupis quociens nos et heredes nostri infra predictum vicecomitatum perhendinari seu morari contigerit. Et serviendo ad opus nostrum et heredum nostrorum omnes anceas et volucres quas capere poterunt quando sumus extra vicecomitatum predictum usque adventum nostrum ibidem,' &c. Haddington MS. p. 66^b^-67^b^.

Under Robert II three baronies were granted to Alexander of Cockburne who was to act—he or his heirs—as chief usher at parliaments, councils, and festivals, receiving liverance for two esquires and two archers with sword-bearers and horses [1]. A third part of Craigmillar in Midlothian was during the same reign held by John of the Chapel for acting as usher of the chapel, as his ancestors had done [2]. All the examples hitherto have been tenures from the crown, but of course all serjeanties were not of that sort. The earls of Douglas aped royalty even in tenures. Thus in 1414 Michael Ramsay, a military officer in their service, received lands in Galloway for rendering the ornamental service of holding the currycombs of the earls [3]. I am not sure that I infringe any obligation of professional secrecy when I say that once it fell to me to examine a title to lands in the vicinity of a great Scottish castle where the service of the vassal was to slaughter the cattle for the family larder and the consequent fee was the hides.

The time-honoured allegation of the Scottish incapacity for the humorous receives some countenance from the scarcity of jocular customs. We in Scotland certainly took our tenures seriously. We can see and enjoy the point of that Shropshire man's obligation [4] to follow the king in war with a bow and arrow 'but so that as soon as he shall see the enemies of the king he shall shoot his arrow, and return!' But we can from our tenures furnish no parallels. The lands appropriately called Horne-huntaris-landis in Peebles-shire were held for the reddendo of two blasts of a horn to wake the king and his huntsmen [5]. Penicuik was similarly held for six blasts at the hunt on the common muir of Edinburgh [6]. Carnwath had the only close parallel known to me of the numerous English popular usages. The baron had to give two pairs of stockings on Midsummer Day to the quickest runner from the end of the village to the Cross [7]. Folk-lore too has its memories of the jocular. The

[1] From charter of Boltoun, Caredyne and Langtoun: 'quod dictus Alexander vel heredes sint principales hostiarii nostri ad nostra parliamenta generalia consilia et festa,' &c. Acta Parl. Scot. i. 580; Hamilton MSS. (Historical Manuscripts Com.), p. 211.

[2] Reg. Mag. Sig. i. 139: 'pro servicio suo in ipso officio hostiarii dicte capelle nostre faciendo.'

[3] For Nethersypland: 'tenentibus strigiles dicti comitis et heredum.' Reg. Mag. Sig. ii. 70.

[4] 'Ita tamen quod quam cito viderit inimicos Regis sagittet bozon et revertatur.' Constable's Roll for muster at Carlisle, 28 Edward I; Palgrave's Documents and Records, i. 219.

[5] 'Reddendo 2 flatus, viz. blastis unius cornu ad excitandum regem et venatores cum contingeret eos esse in venatione in le Kingis-hall-wallis.' Reg. Mag. Sig. ii. 3568.

[6] 'Reddendo 3 flatus in cornu flatili super communem moram de Edinburgh olim forestam de Drumselch nuncupat. ad venationem regis capitalem super dictam moram.' Reg. Mag. Sig. ii. 3173.

[7] 'Alicui viro citius currenti a fine orientali ville de Carnwethe usque ad crucem nuncupatam Halo-crosse.' Respondee Register, Nov. 7, 1522; Riddell's Scottish Peerages, p. 350.

Duries, hereditary dempsters of Edzell in Forfarshire, held Duriehill, according to tradition, with 'the farcical privileges of fishing in the almost waterless burn of Whishop and of hunting on the hill of Wirran with a hawk blind of an eye and a hound crippled of a leg[1].'

I return to legitimate serjeanties only to say that for the use of the term to denote, as in England, not merely a function but its connexion with particular properties there is evidence, though not a plethora. We have, for instance, mention of the lands of the serjeanty of Liberton, of the serjeanties of Cramond, Dumbarton, Wigtownshire, &c. In most if not all of such cases, however, the serjeanty, though it might be hereditary, was a legal office, that of a court officer or messenger at arms, not military. 'Serjandlandis' thus became a somewhat widespread place-name in the fifteenth and sixteenth centuries. We cannot claim that serjeanty took hold in our legal terminology although, as has been seen, it was not without place[2]. Grand serjeanty in England had so many affinities with knight-service that one cannot wonder that the corresponding Scottish tenures by archery and the like are ultimately in their consequences not well distinguishable from knightly tenure; both seem to blend in what was called ward-holding. As for the analogue to petty serjeanty, the tenure by render of arrows, spurs, horse-shoes, hawks, hounds, gloves, roses, &c., this opens up the subject of blench farm, a province too large and special to be dealt with summarily now, but inviting treatment by itself. While its course of development deviates materially from what it pursued in England, the origins are the same in both countries, and the ultimate differences illustrate the effects of opposite principles of fiscal policy and feudal practice.

Feudalism alone could never in Scotland have put a national army into the field: the contingent from tenures would have been ludicrously insufficient. Fortescue in the fifteenth century[3] contrasted with great complacency England with France, looking with pity on the French villages bound each to maintain, in addition to burdens more grievous, at least two archers to serve the kings in their wars. But it may well be doubted whether in England as in France the load did not fall on much the same shoulders. Assuredly tenure did not give the armies either of the Edwards or the Henries. Under Edward I the summonses to feudal tenants account for a very small quota when compared with the large demand made on the counties. In 1298 for the Scottish war

[1] Jervise's Land of the Lindsays (ed. 1882), p. 61.

[2] 'De terra serjantie que fuit Michaelis de Lardario in constabularia de Litheu,' an item of 1336 (Bain's Calendar, iii. p. 342), may be adduced as another example.

[3] De Laudibus, ch. 35.

apparently not 300 military tenants were requisitioned as against drafts on the English shires for 12,500 foot[1]. In 1314 the latter were called upon for 21,500 foot[2] to be compared with the issue, in the peril of the following year, of the feudal summons to 364 military tenants[3]. So in Robert the Bruce's legislation it is profitable to consider a provision (evidently modelled on Edward I's statute of Winchester) enacting that every layman with £10 in goods was to have an acton, bacinet, and gloves of war, with lance and sword, while whoever had a cow was to have a good lance or a good bow with a sheaf of twenty-four arrows[4]. The scale in the Winchester statute began with £15 of land and demanded a horse as well as the personal armour and arms. The Scottish transferred version makes no provision for knights or horsemen at all—in significant harmony with King Robert's favour for serjeanties of archers and infantry.

GEO. NEILSON.

[1] Gough's Scotland in 1298 has the writs, pp. 84–86, 108–111.
[2] Bain's Calendar of Documents relating to Scotland, iii. (Introd. p. xx).
[3] Rotuli Scotiæ, i. 145–147.
[4] Acts Parl. Scot. i. 473. See the statute of Winchester possibly referred to as 'libro Wyntoun lawis.' Ib. i. 752.

THE MOOT SYSTEM.

An Appeal.

IN spite of our boasted enlightenment and our commercial supremacy, we English have been for many years, and still remain, far behind our industrial rivals in our devotion to the purely technical portion of the training necessary to equip a man for a life of activity and usefulness in trade. It is not, therefore, so surprising as it is depressing, to contemplate how little attention is paid by the legal profession, which ought to be, and generally speaking is, the most enlightened in the community, to the education of its young members in the particular matters which belong almost exclusively to it. In the present day, the policy of the Bar seems to be to make no provision whatever, by any organized system, for the acquisition by its students of the high technical equipment requisite for their professional career, but to leave it to individual enterprise, casual effort, and chance.

In effect, the only training of a technical character which is in any way thrust upon a man entering the Bar is the familiar step of 'Reading in Chambers.' This, indeed, is voluntary, but so universally advocated and practised as to be equivalent to a compulsory requirement. Its value, under favourable conditions, cannot be overestimated. But even in this respect the student is largely a creature of chance. To begin with, he must bear the expense of it out of his own pocket, and it may be beyond his means. He must rely almost entirely upon the judgment and advice of others, in a matter about which it is very difficult for any one to advise. He may be so situated as to make it difficult for him to obtain competent and carefully-considered advice at all. Or he may, after avoiding these pitfalls, find himself in a set of chambers with three times as many pupils in harness with him as his busy mentor can conscientiously train, or even supply with real opportunities of self-instruction. At the best it is rather a lottery. *A* may spend fifty guineas and receive a grounding (possibly also make a friendship) which will last him his lifetime, while *B* may spend 200 guineas and get little return. Each must take his chance of a contract of honour, in which nothing is expressed except what appears upon the face of a cheque, and little is implied. This is the system which alone represents any attempt to provide technical education for the Bar.

This is no mere rhetorical statement. It is solid fact; and one has only to compare the training for the Bar with that which is not merely general, but compulsory, in the other learned professions, deficient though it may often be, to stand aghast at the contrast, and to wonder how long it is to continue. Many changes have been made and improvements, no doubt, have been effected since 1855, but can any one to-day maintain that there is, in the language adopted by the last Royal Commission, 'such security as to the professional knowledge of a barrister as the community is entitled to require'? Indeed, the facts are admitted. The real difficulty with those who are interesting themselves in the direction of reform, is to awaken the members of the profession to a sense of their gravity. A good deal has been done in this direction, almost single-handed, during the past few years by the greatest advocate of the present generation, but the response to the appeals of the Lord Chief Justice has been in no sort of way adequate to the strength of the case which he has made.

It is, however, no part of the present purpose to discuss the broader questions involved in the controversy between Lord Russell of Killowen on the one side, and the Council of Legal Education and the Benchers of the Four Inns upon the other. The system of 'mooting' or of holding ordered arguments upon set cases, as a part of the necessary preparation for a professional career at the Bar, or for the eligibility for judicial and administrative posts which a call to the Bar, *ipso facto*, confers, stands altogether by itself. It could not, upon the one hand, be disregarded by any Law University worthy of the name. Upon the other hand, it could be re-established in our midst upon a permanent and satisfactory basis without affecting the scheme of lectures and paper examinations which at present prevails.

It is impossible to assign a date for the original inception of the practice of mooting. One suggestion is that it was copied from the curriculum of the old universities upon the Continent. It is more likely that it was of indigenous growth. Either it was adopted directly from the system of disputations which prevailed at the English Universities long before there was any sort of organized discipline in the Inns of Court, or, at a time when the Inns of Court themselves were a University, it found its place, as a recognized method of instruction, and quite as a matter of course, in the thorough test then imposed upon a student before he could be called to the Bar. However that may be, the records of the four Inns of Court during the sixteenth and seventeenth centuries teem with orders and rules designed to prevent any attempt to evade the performance of the moot-exercises. An example or two will suffice.

In a code of rules made by the four Inns during the reign of Elizabeth the following regulation occurs:—'That none be called to the barr but such as be of convenient continuance and have used the exercises of the house, as in the arguing of cases, putting at bolts, and keeping of the moots and exercises there three years at the least before they be called.' Upon the top of this it was required at Gray's Inn of such as came to be called that they should 'have gone abroad to grand moots six times, have mooted at the utter-barr in the library six times, and have put cases at bolts in term six times, and thereof bring due certificates.' And it was ordered at the Middle Temple: 'No one under three years to practise, otherwise to be fined,' while students were further enjoined to 'keep the case and perform their exercises.' The policy underlying these rules finds expression in a recital to another order (*temp.* Jac. I) in language which strikes upon the ear of the student of modern days with a strange and startling ring: 'Over-early and hasty practices of utter-barristers doth make them less grounded and sufficient, whereby the law may be disgraced, and the clyent prejudiced.'

Stow, in his 'Survey of London,' gives the following description of one of these exercises:—

'After supper in the hall, the reader, with one or two of the benchers, comes in, to whom one of the utter-barristers propounds some doubtful case, which being argued by the benchers, and lastly by him that moved the case, the benchers sit down on the bench at the upper end of the hall; and upon the form in the middle of the hall sit two utter-barristers; and on both sides of them, on the same form, sits the inner-barrister, who in Law-French doth declare to the benchers some kind of action: the one being as it were retained for the plaintiff, and the other for the defendant, which ended, the two utter-barristers argue such cases as are disputable within the said case; after which the benchers do likewise declare their opinions as to how they take the law to be in these questions.'

Other more elaborate descriptions may be found in Dugdale. Probably the ceremony detailed by Stow answers to the special or 'grand' moots which were held 'abroad,' namely at the Inns of Chancery, in addition to those in each hall attended only by the barristers and students of the particular Inn in which they were held. 'Bolts' seem not to have differed from 'moots,' but this is not clear. The word has become obsolete. 'To bolt' was often used, by Burke for example, in the sense of 'to examine carefully,' 'to discuss.' The substantive may have signified the practice which undoubtedly prevailed at moots of putting impromptu cases of disputation, as distinct from the formal argument of points arising upon pleadings prepared in advance for the purpose. Or it may

have referred to that portion of the proceedings which consisted of the recitation of pleadings in Law-French by the junior students, as a means, possibly, of giving them greater confidence when the time came for them to argue. The return made to Henry VIII, by Thomas Denton, Nicholas Bacon, and Robert Cary, upon the condition of the Law University, includes perhaps the clearest and most concise account obtainable of the principle upon which these moots were conducted, and it fits in pretty satisfactorily with the detailed descriptions of Stow, Dugdale, and others. It is quite certain upon a comparison of these various accounts that there were grades or stages of moots through which each student had to pass before his call, and that long after his call every barrister was compelled still to attend and argue. Sir Edward Coke, in his preface to the third part of the reports, tells us that there were degrees of 'mootmen,' and that after eight years study they became utter-barristers, who in their turn became, after twelve years, ancients or benchers. Sir Simonds D'Ewes, who entered the Middle Temple in 1623, gives us some first-hand evidence in his autobiography. 'I had twice mooted in Law-French,' he says, 'before I was called to the Bar, and several times after I was made an utter-barrister in our open hall. Thrice also before I was of the Bar, I argued the reader's cases at the Inns of Chancery publicly and six times afterwards. I sat nine times in our hall at the bench, and argued such cases in English as had before been argued by young gentlemen or utter-barristers in Law-French.'

Quaint, humorous, and not uninstructive are many of the incidents related in the Calendars of the Inner Temple, the 'Black Books' of Lincoln's Inn, and the records of the Middle Temple Parliament and the Gray's Inn Pension, illustrating the history of moots throughout the period during which the system prevailed. Their interest, however, is purely antiquarian. They cannot come to our aid to-day. The old university idea has been destroyed. Corporate life, among students and barristers at any rate, is a thing of the past, and the Gray's Inn butler is no longer liable to be placed in the stocks for putting up a man to moot in his wrong turn. But the records of the time make it clear that when legal education was a reality instead of a sham, the practice of mooting was not only elaborately planned and laboriously organized, but was regarded as an absolute essential.

The decline of the system is contemporaneous with an age, 'which is to be remarked,' wrote Sir Richard Bethell with reference to this subject, 'for its low tone of feeling as to the discharge of public duties.' Roger North tells us that his brother, the Lord Keeper Guilford, who was Chief Justice in 1674, was 'an attendant (as

well as exerciser) at the ordinary moots in the Middle Temple and at New Inn,' and he adds pathetically, 'In those days moots were carefully performed, and it is hard to give a good reason (bad ones are prompt enough) why they are not so now.'

The 'readings' went first. Formerly no counsel could be a serjeant until he had been a 'reader.' But in the time of Charles II, according to Sir J. Bramston, readings were 'totally laid aside,' the qualification of having served as a reader being no longer insisted upon, when the coif was frequently bestowed from political or other indirect motives. The 'readers' had been prominent officials in the moots. With a different class of men now filling the position, the educational character of the exercises was quickly subordinated to feasting and revelling. Speaking of the old moots in the Middle Temple, Dugdale says: 'The moot being ended, all parties return to the cup-board, where the moot-men present the benchers with a cup of beer and a slice of bread: and so the exercise for that night is ended.' Under the new *régime* this simple and harmless ceremony soon developed until the office of 'reader' became too costly even for the men who had been willing to occupy and to debase what had hitherto been a chair of learning and repute, for the purpose of purchasing social popularity with extravagant hospitality. The only relic of the old educational exercise survived in an idle and farcical ceremony of 'putting a case' through which every student had to go on the night of his call, down to a time within the memory of many still living—a ceremony of which Lord Brougham has given us an amusing description.

An attempt to revive moots—apparently the only one of its kind during the eighteenth century—was made at Gray's Inn in 1753. In that year a barrister of the society, Mr. Danby Pickering, was appointed to read lectures for reward in hall, and he continued to do so until 1769, when he was called to the Bench of the Inn. This, of course, was a complete bar to any further individual efforts upon his part in this direction. But during his appointment an order of Pension provided that any point of law might be put to the reader, and publicly debated in hall, with the reader as moderator, at the next lecture. But it does not seem that this half-hearted proceeding led to any result.

The subject was naturally enough brought before both the learned bodies which sat in the middle of this century to consider the condition of legal education, and the constitution of the Inns of Court; but it received scant notice amidst the numerous larger issues which were dealt with in their reports. Before the Select Committee, which sat in 1846, both Lord Campbell and Professor Starkie gave some interesting evidence upon the point, and in 1855 Mr. Whit-

marsh, Q.C., the Treasurer of Gray's Inn, told the Royal Commission that Mr. Lewis, the reader of his Inn, had in 1847 established a voluntary system, which had however been abandoned upon the formation of the Council of Legal Education. 'The young men,' added the Treasurer, 'used to like it very much.' In his evidence before the same body, Mr. Horace Binney, jun., of the American bar, and the son of a distinguished lawyer in the United States, says that at that time there was a regular moot-court for students in Pennsylvania, organized by a voluntary association, but sometimes presided over by judges, for conducting arguments as in Banc, and that a similar institution, called the Law Academy, was in existence in Philadelphia for the same purpose. In America the system has continued uninterruptedly down to the present day, and in the law schools of that country argument in moot-courts is treated as an obviously necessary part of a student's training. In the Harvard Law School the system is conducted upon an elaborate scale. It falls into two distinct parts: a set of official moot-courts conducted by the instructors, and the students' law clubs. Each student is entitled to try his hand in one of the former class, once in his second, and once in his third year. This privilege is not so generally taken advantage of as it would be if the clubs did not accomplish almost the same results in a less formidable way. The law clubs each take in eight members from the new men of every year as they enter, and a sort of recognized precedence has grown up by which one club has the first choice of the new men. The men of each of the first two years, in a given club, form a separate court which is presided over by a 'chief justice' taken from the members of the club in the class above, who draws up the facts of the case to be argued. The 'counsel' are two members of the club of the same year as the judges. Each of the eight argues four cases in the first year, two in the second, when he sits twice as 'chief justice' in the court below, and in the third year he merely sits once as 'chief justice' in the second-year court. The judgment is generally submitted to one of the professors, and the subjects of the cases are so arranged that each deals with a topic which the instructors are just about to reach. Whatever may be said of this system it has the merit of enjoying the confidence of the students, who derive great advantage from it.

The club system dates from 1870. Until that time the Harvard Law School authorities themselves had undertaken the work, and had held a moot-court regularly once a week, presided over by one of the professors as judge, and this court had always been regarded as an important feature of the educational work of the school. It has, however, almost died out, not from any inherent defects, but

under the stress of competition. The clubs, of which there are now from fifteen to twenty at Harvard, have proved so successful that, in the view of the authorities, the necessity of making further provision has been removed. So that American law students not only do not kick against compulsory mooting, but have risen above it by their enthusiasm for the practice. Does not this alone afford an answer to those who say that the thing can never be made to work in England? Have we less enthusiasm than they, or is it that no opportunity is given us to show it?

So great is their enthusiasm at Harvard that the whole of the facts and the law upon which their discussions turn are carefully prepared, and printed days, or even weeks, in advance. First, the judge's statement of facts is printed, with the date of the hearing, and the names of the counsel. Then both the plaintiff's and the defendant's briefs, with the points elaborately mapped out and subdivided, together with some of the cases to be relied upon in support of the arguments, are also printed and filed. One of these briefs, now before the writer, extends over some seven printed pages. The work of preparation alone must be an education in the subject with which it deals.

A determined effort to revive the practice of mooting amongst us was made by Sir Frederick Pollock when he lectured for the Council of Legal Education. He regularly concluded each term's course with a moot, and the writer has his authority for saying that the men always showed great interest and often argued with skill and ingenuity. It is indeed surprising that no one has thought it worth while to follow the example.

But the only attempt to carry on this work to be found at the present day is a voluntary association at Gray's Inn. This society, the very existence of which is but little known outside its own Inn, was founded in 1875, mainly by the efforts of its first and only president, Mr. J. A. Russell, Q.C., and a few students. Fostered and encouraged by the Benchers of the Inn, who by an annual grant discharge the slight expense it entails, it has gone quietly on its way, and at the present moment it is certainly in as flourishing a condition as at any period in its history. A moot-court is held there six or eight times a year. It is generally presided over by a 'silk,' who is not a member of Gray's Inn. Three Lords of Appeal, and a majority of the Judges of the Supreme Court now upon the Bench, have at one time or another during their career at the Bar, undertaken this office. Occasionally, when first invited, they have been ignorant of the society's existence; invariably they have known little of its object and procedure; without exception, after their visit was over, they have expressed a high

opinion of its utility, and surprise at its 'splendid isolation.' There are many in considerable practice, and some of them 'leaders,' now at the Bar, who are quick to testify to the advantages they derived from it in their young days. Yet, until a few months ago, no other Inn has ever attempted to follow the example, and the single effort recently made in this direction at the Inner Temple seems to have been of a somewhat tentative and hesitating character. The attention of the profession has been aroused, however, by the visit which Lord Russell of Killowen paid to Gray's Inn a few months ago, to deliver an annual address to the members of the society. 'I want to know,' he asked, 'why if this system of moots was found to be a necessary part of legal training in the past, and why, if we are of that opinion now, it should not be a necessary part of the legal system in our days? Why should it be left to the voluntary efforts of young men?'

Now, if the Lord Chief Justice's question had been 'Why is it so?' it would have admitted of many answers outside the scope of this paper. But is it possible to give one good and solid reason why it should be so? The expense of the revival of the system at each of the Inns would be small; the practical difficulties, though obvious, are far from formidable; the indifference of students themselves, if it could be shown, would be the strongest possible argument in favour of the system; and there can hardly be a Bencher who seriously regards it as a matter outside a Bencher's province. 'The rules of the several societies,' wrote Sir Richard Bethell to the Master of the Rolls in 1846, 'by the observance of which they must be considered, both legally and morally, as holding their privileges and possessions, prescribe to the Benchers the duty of seeing that the students do well and diligently perform the "moots" and exercises, and attend the "readings" which were admirably adapted to imbue young men with a serious knowledge of law, and to train them in legal dialectics and habits of ready application of their knowledge, which were excellent preparations for the active duties of their profession.' Has the establishment of the Council of Legal Education removed this duty from their shoulders, or produced the results which Lord Westbury desired to see? What is known or cared of the humble but aspiring student, who comes to his Inn of Court, having no social connexion with, or personal introduction to, any Bencher, by those who are, legally and morally, charged with such a solemn duty with regard to his welfare? Is it enough that they should have inquired into his reputation for good character, shaken hands with him, drunk his health, and given him the right to practise?

One thing is certain. If 'moots' are to be left to voluntary

effort they must be organized by the men themselves; if they are to be made, as they surely ought to be made, compulsory, they must be organized by the governing body. One of the first difficulties that presents itself in considering a compulsory scheme is the number of students who have to be provided for. A much wider area has to be dealt with than in the old days. A moot every evening for five days in every week during the four dining terms, would hardly enable each student to moot once in the twelve months, and three moots before call to the Bar ought to be an irreducible *minimum*. It would be possible, no doubt, to divide barristers into two classes: a nominal class, to include all who had no intention of practising in this or any other country; an effective class, to include all proposing practitioners. In the latter case, a certificate might be granted, and a rule made, as in the other branch of the profession, that no barrister should practise without such certificate. Arguing in moots might then be permissive in the former case; while no certificate to practise would be granted to any who had failed to pass the requisite number of moots. An alternative would be to provide a set of moots earlier in the day, say for second-year men (first-year men not being eligible at all), reserving the more important post-prandial occasions in hall for the more advanced. Or it might be arranged so that no one should moot until he had passed his paper-examinations. The number of students eligible for the ceremony would then be more limited, and the period of eligibility being shortened, not more than two moots need be required of each student, unless the presiding judge made an order postponing his call until he had mooted once or twice more. By this arrangement it would not be difficult to include every individual student. Looking at the enormous number of judicial and administrative posts of responsibility which are open to and exclusively enjoyed by members of the Bar, and to which they are often appointed without the slightest regard to their experience of courts of law, or their knowledge of practice, the universal application of the system is to be preferred. Possibly, too, the manners of the barrister county gentleman who presides in Petty Sessions might be less like those of a serjeant-major on parade towards the professional men who are unfortunately for themselves compelled occasionally to appear before him, if he had himself been drilled once or twice in the not always pleasant or easy task of arguing a case. But these are mere details, requiring, no doubt, careful consideration and adjustment, which cannot affect one iota the recognition of the principle.

Presiding judges in considerable numbers would have to be provided, and their regular attendance secured. This duty ought

to be, and to a great extent could be, borne by the Benchers themselves, with the addition of a few of the more advanced members of the profession selected by them from those who are qualifying, so to speak, to become Benchers in their turn. Would it be asking too much of a Bencher (Judges, of course, by reason of their position, and all octogenarians, if they desired, might be exempt) to give up one or two evenings of two hours each in each dining term to sitting in a Moot Court, assisting by his presence and his judgment the discussion of a case by young men who have a right to look to him for guidance and encouragement? Experience has shown that scores of men, without any obligation upon them, will cheerfully do it, and be grateful for the opportunity.

In the old days the learned leaders of the profession were proud to gather about them bands of young men, who, anxious to pick up some crumb from the master's table, thronged round them in their leisure moments in Westminster Hall, and keenly debated knotty points. Moots had been their introduction. Upon the common ground of formal argument in hall, inner-barrister and utter-barrister, reader and ancient, met for the common good of all: the one to argue and learn, the other to argue and teach. A noble ideal, but too picturesque of course for the nineteenth century. Yet something like it, adapted to the altered habits and customs of modern life, might well grow out of a revival of mooting to the great gain of the profession. It may be that some of the disloyalty to our old unwritten laws of etiquette and code of honour which some have marked as a growing characteristic of the modern Bar, is attributable to the widening of the gulf between veteran and neophyte.

Amongst young men themselves an organized system of mooting would be certain to create a stronger bond of union, and so close some of the gaps which the decay of the old circuit fellowship has created. Those who are acquainted with its working in America assert that its great value there is that it brings men together in their work, introduces a strong competitive element, and a certain *esprit de corps*.

To the individual the advantages are palpable enough. In all branches of education pure book-learning is made a fetish; in the law everything is sacrificed to it. Yet it is a platitude that learning, however profound, is, in the law above all places, of little avail without an equivalent of readiness and skill in application. These things are, of course, often born in a man, but they are also to be acquired. As Lord Russell of Killowen has pointed out, it is a distinct gain to a man if he can try his prentice hand before

he practises upon a client. In a moot or two he will have his faults exposed, his shortcomings pointed out; he will acquire greater facility of speech; he will begin to master the art of order and arrangement in argument; he will learn to overcome nervousness and prolixity; and he will obtain a grip upon the question he is invited to tackle, and others cognate to it, which he is not likely to lose.

These propositions seem so obvious that one can but express astonishment that they should be completely ignored by those who are responsible for the education of men for the Bar. The fact is that instruction is confused with education. The memory is strained, but the mind is not cultivated. Cases, statutes, *formulae, dicta,* all well enough in their way, are to be crammed into the brain, and poured out over an examination paper, by the student, while but little regard is paid to the relation they bear to the demands to be made upon the barrister in the daily life of his profession. The narrowing tendency of a highly technical education in the law is often alleged, with some show of reason, as a strong objection against it. But no one advocates the neglect of general culture, which is of greater value, perhaps, in the law than anywhere else. The one is the handmaid of the other. All that is here contended for is that there is too little of a technical, and nothing whatever of a practical character in the present system; and that those who are responsible for it are blind to the splendid precedent which has been provided by their predecessors, which has stood the test of time, and which may be followed with little trouble and infinitesimal expenditure.

CECIL WALSH.
(Hon. Sec. of the Gray's Inn Moot Society.)

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Davidson's Concise Precedents in Conveyancing. Seventeenth Edition. By M. G. DAVIDSON and S. WADSWORTH. London: Sweet & Maxwell, Lim. 1899. 8vo. 950 and lii pp.

THIS well-known work certainly presents in an exceedingly compact form a very useful compendium of the law and practice of conveyancing. Conveyancers sometimes do their work out of town. The eminent Mr. Booth has recorded that he penned one of his most celebrated opinions in the country; and the doctrine he then propounded has left an apparently indelible mark in English law. Practitioners retiring in the vacation out of reach of Law Reports but not of papers cannot take with them a safer guide or more handy companion than the present volume, which within one cover not only presents a trustworthy collection of precedents applicable to almost every transaction within the range of ordinary conveyancing and annotated with sound observations on the law and practice, but also contains preliminary dissertations on the Real Property Act, 1845, the Conveyancing Act, 1881, and the Land Transfer Acts, and has an Appendix giving the text (with notes) of the Real Property Act, the Vendor and Purchaser Act, the Contingent Remainders Act, 1877, the Conveyancing Acts, 1881, 1882 and 1892, the Settled Land Acts, the Married Women's Property Acts, 1882 and 1893, the Trustee Acts, 1888, 1893 and 1894, and Part I of the Land Transfer Act, 1897. No disparagement of the learned editors' work is intended in commending its portable form: on the contrary, it may be consulted with profit in chambers, and the writer has found it a useful book of reference in practice. What is principally new in the present edition is the observations on registration under the Land Transfer Acts, and these are practical and pertinent. We note a defect, which seems common to all books of conveyancing precedents—the absence of any special clause to be inserted in a contract for sale of lands and settled on the purchaser's behalf, such as a stipulation exonerating him from the expense of the production of title-deeds in the possession of the vendor's mortgagees or allowing him to deposit the purchase money in a bank in case of delay in completion attributable to the vendor's fault. This is the more remarkable in the present case that the editors show (see p. 109, n. (a)) that they are fully aware how burdensome on purchasers the conditions of sales by private contract are too frequently made.

T. C. W.

Catalogue d'une Bibliothèque de Droit International et Sciences auxiliaires: Brouillon de la table systématique des fiches. Paris: A. Pedone. Leipzig: F. A. Brockhaus. 1899. 4to. xxiv and 406 pp. [Not for sale, but a limited number of copies are held by the publishing houses named at the disposal of scholars specially interested who may apply for them by signed letter.]

THIS essay towards a classified catalogue of the literature of international law and allied subjects is put forward only as a draft, as the learned author explains in a discreet preface. It includes the Conflict of Laws. The arrangement seems rational and convenient. The book is printed at Barcelona, and Spanish books and diplomatic documents have received special attention. Detailed criticism would for the present be out of place. But, in view of an eventual publication in the ordinary way, we may observe that the utility of a work of this kind is much increased by the addition of an alphabetical index, such as is found, for example, at the end of Van der Linde's classical bibliography of Spinoza. F. P.

We have also received:—

The Practitioner's Guide to the Duties of Executors and Administrators from Death to Distribution; with which is incorporated Layton and Hart's Practical Guide to the Making and Proving of Wills. Second Edition. Revised and corrected by J. F. C. BENNETT. London: Waterlow Brothers & Layton, Lim. 1899. La. 8vo. xxv, 324 and 386 pp. (17*s.* 6*d.*)—The preface to this work states that in this edition 'the notes of practice on proving wills, obtaining grants of letters of administration, and preparing and passing the intricate affidavits and accounts for Inland Revenue, have been greatly amplified.' It is also stated that the latest statutes and decisions affecting the subject have been added, and the index and table of cases enlarged. It is a pity that more care was not bestowed on the revision of the proofs. Such items as '12 Ch. & F.', 'L. R. Q. P. 273', 'Wilktw.', '67 L. T. P.', '15 Sum.' and '27 L. T. 8111' do not appear to refer adequately to any volumes of law reports known in Lincoln's Inn.

Ruling Cases. Arranged, annotated and edited by R. CAMPBELL. With American Notes by IRVING BROWNE. Vol. XVIII. Mortgage—Negligence. London: Stevens & Sons, Lim. Boston: The Boston Book Co. 1899. La. 8vo. xxxiv and 736 pp. (25*s.*)—More than 600 pages of this volume of Ruling Cases are devoted to the important subject of Mortgage. The selection of the cases and the majority of the English notes are the work of the late Mr. L. G. Gordon Robbins.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XL. 1834-36 (3 Knapp; 7 Simons; 1 A. & E.; 3 N. & M.; 1 C. M. & R.; 5 Tyr.; 6 C. & P.). London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1899. La. 8vo. xvi and 880 pp. (25*s.*)

The Law of Trade Marks. By L. B. SEBASTIAN. Fourth Edition by the Author and H. B. HEMMING. London: Stevens & Sons, Lim. 1899. La. 8vo. xcvi and 756 pp. (30*s.*)—Review will follow.

A Digest of the Law of Evidence. By the late Sir JAMES FITZJAMES STEPHEN. Fifth Edition. By Sir HERBERT STEPHEN and H. L. STEPHEN. London: Macmillan & Co., Lim. 1899. 8vo. xlviii and 271 pp. (6*s.*)

Digest of Licensing Cases. By W. MACKENZIE and H. DRYSDALE WOODCOCK. London: Butterworth & Co.; Shaw & Sons. 1899. 8vo. xxviii, 206 and 34 pp. (10*s.* 6*d.*)

A Concise Treatise on the Law relating to Legal Representatives; real and personal. By SYDNEY E. WILLIAMS. London: Stevens & Sons, Lim. 1899. 8vo. xlviii and 271 pp. (10*s.*)

The Law of Meetings. By GEORGE BLACKWELL. Second Edition. London: Butterworth & Co. 1899. 8vo. xii and 128 pp. (2*s.* 6*d.* net.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.